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No. 4887

United States

1479

Circuit Court of Appeals

For the Ninth Circuit.

J. W. DUNFEE,

Appellant,

vs.

C. A. TERWILLIGER, on Behalf of Himself and
All Other Stockholders of the ORLEANS
MINING AND MILLING COMPANY, a
Corporation, Similarly Situated,

Appellee.

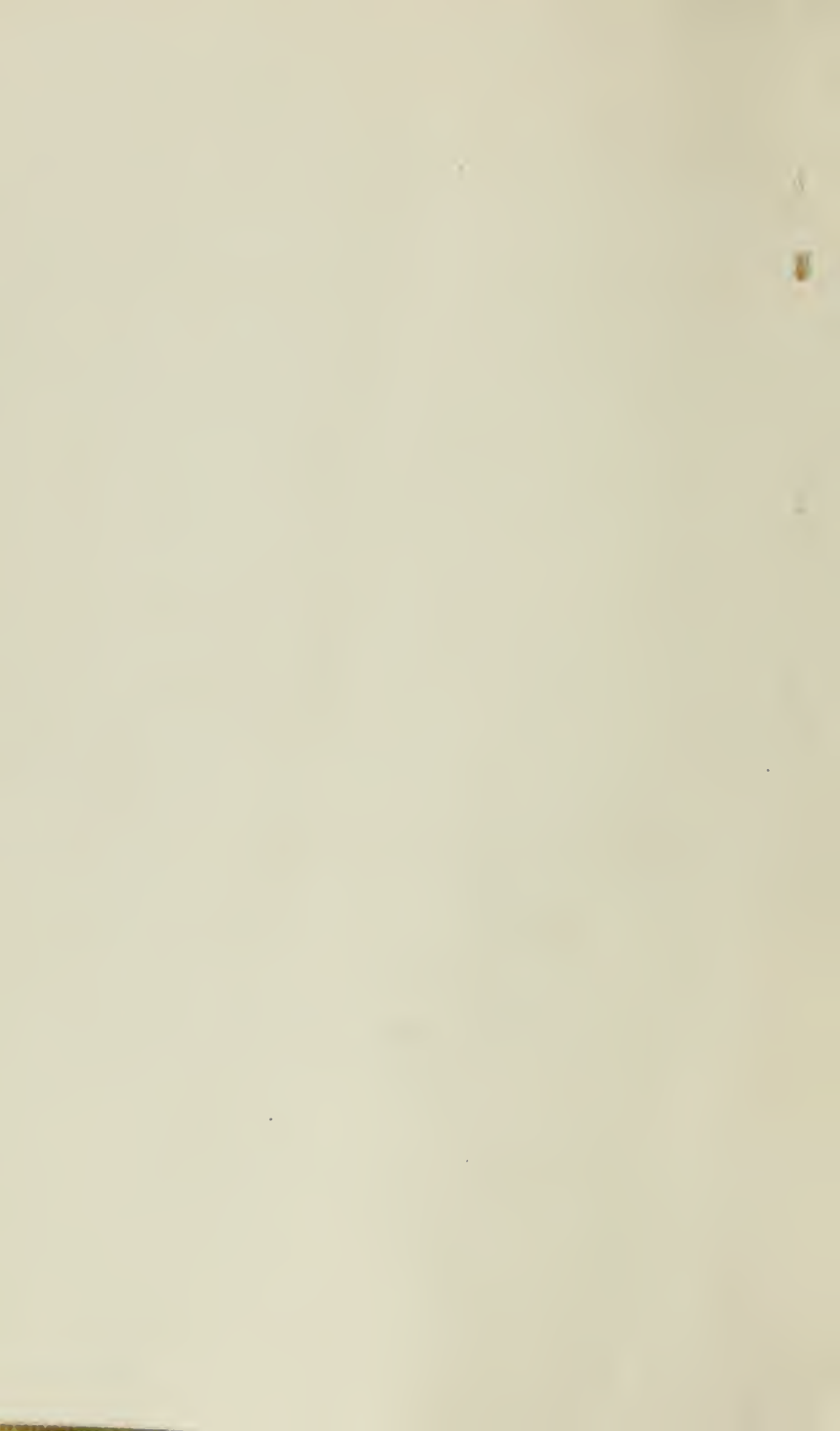
Transcript of Record.

Upon Appeal from the United States District Court for
the District of Nevada.

FILED

JUL 17 1926

F. D. MONCKTON,
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NAMES AND ADDRESSES OF ATTORNEYS
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Mr. AUGUSTUS TILDEN, First National Bank
Bldg., Ocean Park, California, and Mr. JNO.
F. KUNZ, Reno, Nevada,
For the Plaintiff in Error.

Messrs. COOKE & STODDARD, Reno, Nevada,
For Defendants in Error. [1*]

In the District Court of the United States in and
for the District of Nevada.

IN EQUITY—No. B-39.

C. A. TERWILLIGER, on Behalf of Himself and
All Other Stockholders of the ORLEANS
MINING AND MILLING COMPANY, a
Corporation, Similarly Situated,
Plaintiff,

vs.

J. W. DUNFEE, ORLEANS MINING AND
MILLING COMPANY, a Corporation, J.
W. DUNFEE, E. CARTER EDWARDS
and CHARLES ELLSWORTH, Directors
of Said Corporation, and ORLEANS MIN-
ING AND MILLING COMPANY, a Cor-
poration,

Defendants.

*Page-number appearing at foot of page of original certified Tran-
script of Record.

COMPLAINT.

Comes now the plaintiff above named complaining on behalf of himself and all other stockholders of the Orleans Mining and Milling Company, a corporation, similarly situated, and for cause of action plaintiff alleges and shows to the Court:

I.

That the defendant, Orleans Mining and Milling Company, at all times herein mentioned from and after September 16, 1916, was and now is a corporation duly created, organized and existing under the laws of the State of Arizona, with its principal Nevada office and place of business at Goldfield, in Esmeralda County in said state, and owning real and personal property and mining rights in Hornsilver Mining District in said Esmeralda County; that said corporation was and is capitalized for one million shares of the par value of \$1.00 per share, and the [2] shares thereof are nonassessable; that 600,202 shares and upwards are issued and outstanding; that the objects and purposes for which said corporation was formed were to engage in mining and mine operations, and particularly mining and developing the leasehold mining estate hereinafter mentioned; that J. W. Dunfee, E. Carter Edwards, C. A. Terwilliger and Charles Ellsworth were and are the duly elected, qualified and acting Directors of said corporation; that the said defendant, J. W. Dunfee, was and is the duly elected, qualified and acting President, General Manager and Treasurer, the said plaintiff, C. A. Terwilliger, was and is the duly elected, quali-

fied and acting Vice-president, and the said E. Carter Edwards was and is the duly elected qualified and acting Secretary.

II.

That at all times as herein mentioned and at the time of the commencement of this suit the said Orleans Mining and Milling Company was and now is a citizen and resident of the State of Arizona, and said defendants, J. W. Dunfee, E. Carter Edwards, Charles Ellsworth and Orleans Hornsilver Mining Company were and now are citizens and residents of the State of Nevada; that this suit is not collusive one to confer on a federal court jurisdiction and cause of which it would not otherwise have cognizance, that the amount in controversy, exclusive of interests and costs, exceeds \$3,000.00.

III.

That at all times herein mentioned since on or about July 23, 1921, the said defendant, Orleans Hornsilver Mining Company was and now is a corporation created, organized and [3] existing under the laws of the State of Nevada.

IV.

That at all times herein mentioned since on or about September, 1916, the plaintiff has been and now is the owner of Certificate #96, representing 267,000 shares of the capital stock of said Orleans Mining and Milling Company, and is registered as such owner upon the stock-books and records of said corporation; and plaintiff alleges that said 267,000 shares so owned and held by him, or any

part of the same, were not voted directly or indirectly at any stockholders' meeting of said corporation in authorizing or confirming any of the acts or things hereinafter complained of.

V.

That said defendants, J. W. Dunfee, E. Carter Edwards and Charles Ellsworth, comprise a majority of the Board of Directors of said Orleans Mining and Milling Company, and said named defendants also own or control more than a majority of the issued and outstanding stock of said Orleans Mining and Milling Company; that said named persons, directors and stockholders aforesaid knowingly caused and committed the wrongs herein complained of or connived at and approved of the same, and that therefore plaintiff and other stockholders of said Orleans Mining and Milling Company similarly situated have been and are unable to have said wrongs righted or to obtain any redress either by action of the Board of Directors or by appeal to the stockholders of said Orleans Mining and Milling Company, and that for the reasons stated any appeal to said board or to said stockholders for relief in the premises would be wholly unavailing and futile. [4]

VI.

And plaintiff further avers and shows to the Court that on September 2, 1916, for the use and benefit of said Orleans Mining and Milling Company, plaintiff and defendant, J. W. Dunfee, made and entered into an agreement in writing, in the words, form and figures following, to wit:

“Los Angeles, Cal., Sept. 2, 1916.

IT IS HEREBY AGREED by and between J. W. Dunfee of Hornsilver, Nevada, party of the first part, and C. A. Terwilliger of Los Angeles, California, party of the second part, as follows:

In consideration of the party of the first part giving to the party of the second part a fifty per cent interest in and to the Orleans Development Mining & Milling Company, consisting of a lease on the following five claims, namely the Orleans No. 1, No. 2, No. 3, Orleans Extension and Orleans Extension No. 1, together with all other Extensions or purchases thereto belonging, said second party agrees to raise Eight Thousand Dollars (\$8,000) as follows, to wit:

Five Thousand Dollars to be raised in sixty days after the books of the Company are ready so that the stock of the Company can be delivered; The remaining Three Thousand Dollars in 120 (one hundred and twenty) days after the books of the company are ready.

It is further agreed by the parties hereto that the first \$3000 Three Thousand Dollars is to be paid to said J. W. Dunfee personally, the remaining Five Thousand Dollars is to be used for the development of the property.

It is further agreed that the party of the second part is to advance the necessary money for the organization of the company and this money is to be returned to said second party when the Five Thousand Dollars is raised.

It is also agreed that the money advanced by said first party in working the property from the time work is started until there are funds in the treasury of the company to meet these bills, it to be repaid to said party of the first part when Five Thousand Dollars is raised.

It is further agreed that for every share of his own stock sold by party of the second part in raising Five Thousand Dollars, said party of the first part is to receive five cents per share up to \$5000.

It is further agreed that should it be deemed advisable [5] after the full eight thousand dollars is raised to raise more money for development, the stock so sold shall be taken share for share from the holdings of J. W. Dunfee and C. A. Terwilliger, respectively.

It is further agreed by the parties hereto, that if either of them desire to sell their stock that it is optional with each party, to each furnish one-half of the stock so sold, and the party selling the stock is to receive 25 per cent commission for such sale.

In case of any controversy arising over this lease or contract, it is hereby agreed that all differences shall be settled by arbitration, each party to this contract picking a man and these two choosing a third, the decision of the three arbitrators being final.

IN WITNESS WHEREOF the parties to this Agreement have hereto set their hands and seals, the day and date first above written.

(Signed) J. W. DUNFEE,
Party of the First Part.

(Signed) C. A. TERWILLIGER,
Party of the Second Part.

Witness:

(Signed) M. G. TERWILLIGER.

that at the time said agreement was made all ground surrounding the mining claims described in said agreement for a distance of 2,000 feet or more was located and held in private ownership by third parties and none thereof was for sale, which condition was a continuing one, all of which was well known to and understood by plaintiff and said defendant, J. W. Dunfee, at the time of making said agreement; that prior to and at the time said agreement was made the defendant, J. W. Dunfee, represented to plaintiff that he, the said Dunfee owned the lease theretofore granted by the Le Champ D'Or French Company, a corporation or company mentioned in paragraph I of said agreement, also that said lease had been granted him by said French company which owned the mining claims mentioned in said agreement, and that he, the said defendant, had had the same or a similar lease from said French [6] company for some years prior, and had mined and taken out from said mining claims about \$85,000 gross; also that he, the said Dunfee, was on very close and intimate terms with said French company, and particularly

with the said E. Carter Edwards, who was the agent and attorney-in-fact for said French company, and that because thereof he, the said Dunfee, could and would obtain any renewal or extension of said lease, also option to purchase said mining claims, that might be desired by plaintiff, the defendant Dunfee, or the corporation to be formed, to wit: the said Orleans Mining and Milling Company. The plaintiff, who then and there and now and at all times herein mentioned had resided in Brawley or in Los Angeles, both in the State of California, was and remained wholly unfamiliar with the subject matter of said lease and of extension or renewal conditions thereof, and wholly trusted and depended upon the said defendant, Dunfee, and believed and relied on his statements that he alone could obtain such extensions or renewals and that he would obtain the same for the use and benefit of said corporation whenever deemed desirable or necessary; that plaintiff and said defendant, Dunfee, had been well acquainted with each other for many years, and said defendant represented and assured plaintiff that because of such acquaintance and friendship, said plaintiff could implicitly trust him, the said defendant Dunfee, as he would never be other than absolutely honorable with an old friend; that said Orleans Development Mining and Milling Company mentioned in said agreement had not then been incorporated, and that said name so used therein referred to a corporation being incorporated as mentioned in the fourth paragraph of said agreement, to wit:

the said Orleans Mining and Milling Company.
[7]

VII.

That upon the execution and delivery of said agreement the plaintiff at once entered upon the work and business therein mentioned and advanced the necessary money for the incorporation and organization of the corporation in said agreement contemplated and provided for, to wit, the Orleans Mining and Milling Company, and said company was duly incorporated, and thereupon plaintiff raised and paid in the sum of Eight Thousand (\$8,000.00) Dollars as provided for in said contract; and that in consideration of the delivery of the total authorized capital stock, to wit: one million shares of said corporation the said defendant, Dunfee, was to deliver his then existing lease on said mining claims and said contract between plaintiff and defendant of September 2, 1916, above set forth, to said corporation, all of which was duly done; that said leasehold estate so delivered in by said defendant, Dunfee, to said Orleans Mining and Milling Company was and remained its chief and only asset of value; that thereupon and to enable said corporation to further finance itself the said Dunfee, pursuant to an agreement with this plaintiff and in consideration of the premises, delivered into the treasury of said corporation 400,000 shares, and pursuant to said agreement 300,000 of the remaining 600,000 shares were delivered to plaintiff and others associated in interest with him, and the

defendant Dunfee retained the remaining 300,000 shares for his own use and benefit.

VIII.

That thereupon said corporation organized, the defendant Dunfee being elected a director, president, treasurer and general [8] manager, and said corporation commenced the business of mining said leased premises, the said defendant Dunfee having at all times full and exclusive charge, control and management of all and singular said business from thence hitherto; that as plaintiff is informed and believes and so alleges the lease from said French company held by said defendant Dunfee and delivered in as aforesaid to said Orleans Mining and Milling Company expired on or about June, 1917, and pursuant to his said agreement, the said defendant duly procured for the use and benefit of said Orleans Mining and Milling Company, a renewal or extension of said lease until June, 1918, and then obtained in like manner another renewal or extension of said lease until June 1, 1920; that from and according to reports made from time to time by the said defendant, Dunfee, as president and general manager, the said Orleans Mining and Milling Company did not become self-sustaining, though large and valuable bodies and deposits of ore in said leased premises were discovered by means of the moneys paid in by plaintiff as aforesaid, and large and frequent shipments of ore were made from time to time, and in truth and in fact the mine showing continued to improve so

that in March, 1920, the prospect for a large and paying mine was much more favorable than previously, all of which was well known to and understood by said defendant, Dunfee.

IX.

And plaintiff further avers and shows to the Court that said defendant, Dunfee, having on or about March, 1920, conceived the intent and purpose of cheating and defrauding said Orleans Mining and Milling Company out of its said leasehold estate and [9] property, and also to cheat and defraud this plaintiff and other stockholders similarly situated out of the value of their stock in said corporation, and with the fraudulent intent and purpose to obtain and appropriate to his own use and benefit the said property, on or about June 1, 1920, when said French company's lease to the Orleans Mining and Milling Company expired, the said defendant, Dunfee, while still a director, president, treasurer and general manager of said Orleans Mining and Milling Company as aforesaid and in exclusive charge of its business and operations, did secretly negotiate for and later, to wit, on June 5, 1920, obtain from said French company a lease of said mining claims, and on or about December, 1920, the said defendant, Dunfee, pursuant to his corrupt and fraudulent purpose aforesaid, did attempt to wholly exclude said Orleans Mining and Milling Company from ownership or any right or interest in said lease and from the possession of the mining claims therein mentioned by causing said lease so obtained by him to be assigned and delivered to said defendant,

Orleans Hornsilver Mining Company, in consideration as plaintiff is informed and believes and so states that said Orleans Hornsilver Mining Company pay to said defendant, Dunfee, in installments from time to time an aggregate of \$50,000 in cash, and 150,000 shares of its capital stock; and that pursuant thereto the said defendant, Dunfee, as president, treasurer and general manager aforesaid of the Orleans Mining and Milling Company, delivered possession to said Hornsilver Mining Company, or permitted it to take possession, of all and singular the property, real and personal, of said Orleans Mining and Milling Company, and then and thereby said Orleans Mining and Milling Company was [10] ejected and ousted from its possession of said property; that prior to said alleged assignment the said Orleans Hornsilver Mining Company as plaintiff is informed and believes and so alleges had full knowledge or notice of all and singular the facts and circumstances above set forth; that neither plaintiff or any other stockholders similarly situated made discovery of the said fraudulent acts and purpose of said defendant, Dunfee, until on or about July, 1921, whereupon plaintiff at once employed counsel to institute appropriate legal proceedings on behalf of said Orleans Mining and Milling Company, but beyond making investigations said counsel did nothing, and on or about March 1, 1922, said counsel advised plaintiff he was unable to proceed further with said matter, whereupon plaintiff employed his present counsel. That plaintiff is ready to do and have equity in the prem-

ises, and that plaintiff has no plain, speedy or adequate remedy at law. That during and while said defendant, Orleans Hornsilver Mining Company, has been in possession of said mining claims, it has mined, broken down, extracted and shipped a large quantity of valuable gold and silver-bearing ore, and has appropriated the proceeds thereof to its own use and benefit, and as plaintiff is informed and believes, said corporation will continue to mine, break down, extract and ship ore from said mining claims unless prevented by restraining order or other injunctive process of this Court; that said premises are valuable only for the gold and silver ores therein contained, and said defendant by mining the ores and appropriating the proceeds thereof is destroying the estate and property of said Orleans Mining and Milling Company therein, and that the damages so caused would be impossible of [11] any reasonably accurate computation.

WHEREFORE, plaintiff prays the decree of this Honorable Court:

(1) That the lease so as aforesaid obtained by the said defendant, J. W. Dunfee, on or about December, 1920, and by him assigned to the defendant, Orleans Hornsilver Mining Company, be decreed to be the sole and exclusive property of the Orleans Mining and Milling Company, and that in respect of all things done by said defendant, Dunfee, in the negotiating for or obtaining said lease, he acted as a trustee and for the use and benefit of said corporation.

(2) That said defendant, Orleans Hornsilver Mining Company, be decreed to have no right, title or interest in or to said property, lease or leasehold estate, or to the possession of the said property, or the mines, mining claims so leased, and that it be decreed that said corporation forthwith surrender and yield possession of said property to the Orleans Mining and Milling Company, and said Orleans Hornsilver Mining Company be required to account for any and all ores mined, extracted or shipped from said premises by it during and while it has been in possession of said property; that said Orleans Hornsilver Mining Company pending trial herein be restrained and enjoined from further working or mining in or upon said mining claims or shipping any ore therefrom, and that by final decree herein it be perpetually enjoined from having, claiming or asserting any right, title, interest, estate or possession in or to said property or the leased mining claims or any part thereof.

(3) That plaintiff recover from the defendants, J. W. Dunfee [12] and Orleans Hornsilver Mining Company, his costs and disbursements incurred herein, and

(4) That plaintiff have such other and further relief as the equities of the case may warrant and which to the Court shall seem meet and proper.

COOKE, FRENCH & STODDARD,

Attorneys for Plaintiff.

State of California,
County of Los Angeles,—ss.

C. A. Terwilliger, being first duly sworn, says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated upon his information and belief, and as to those matters, he believes it to be true.

C. A. TERWILLIGER.

Subscribed and sworn to before me this 24th day of March, 1922.

[Seal] GEORGE H. SCHNEIDER,
Notary Public.

My commission expires Sept. 1, 1925.

[Endorsed]: Filed this 3d day of April, 1922.
[13]

[Title of Court and Cause.]

SEPARATE ANSWER OF DEFENDANT
DUNFEE.

Answering the bill of complaint of plaintiff on file herein, defendant J. W. Dunfee admits, avers and denies as follows:

I.

Answering paragraph I defendant avers that in addition to the parties named in said paragraph as the directors of the Orleans Mining & Milling

Company, hereinafter called the Orleans Company, one Celora M. Stoddard is, and since the 14th day of August, 1917, has been, a director of said company; that said Stoddard is, and at and before the time of the commencement of this action was, a citizen and resident of the City of Phoenix, State of Arizona, and is a necessary party to this action. Denies that the Orleans Company owns, or since the 30th day of May, 1919, has owned, real or personal or any property or mining or any rights or right in Hornsilver Mining District or anywhere. Avers that on the 19th day of June, 1915, and thence until the 30th day of May, 1919, the Orleans Company by itself and this defendant owned a lease on the mining claims named in said complaint; that it acquired said lease by assignment from this defendant in pursuance of the terms of the written [14] agreement set forth in said complaint; that said lease contained, among others, the following terms: "That the said lessee shall work at least sixty shifts of one man during each and every month continuously during the life time of this lease," and "that should the lessee fail to work at least sixty shifts of one man during any month, this lease would terminate at the end of the following month."

II.

Answering paragraph IV, defendant avers that he has no information or belief as to whether or not plaintiff was, at the time of the commencement of this suit, or since has been, or is, the owner of certificate #96 or any certificate representing 267,000 or any

shares of the capital stock of the Orleans Company, and placing his denial on that ground denies that plaintiff was at said time, since has been, or is the owner of said or any certificate or shares or share of said company. Denies that said 267,000 shares were not voted directly or indirectly in authorizing or confirming any of the acts or things mentioned in said complaint; avers that said shares were, at the time in this paragraph mentioned, the balance of an original total of 300,000 shares issued to plaintiff in pursuance of the terms of the said written agreement; that 33,000 thereof were thereafter, and before the times in this paragraph mentioned, disposed of by plaintiff to certain parties; that such parties are the other alleged stockholders for whose benefit, in addition to his own, plaintiff purports to be prosecuting this suit and are the identical parties referred to in said complaint as plaintiff's associates; that on and prior to in said complaint as plaintiff's associates; that on and prior to the 30th day of September, 1918, plaintiff and said [15] associates served and caused to be served upon this defendant and through this defendant upon the Orleans Company a demand in writing of which the following is a copy, to wit:

Brawley, Cal., Sep. 30, 1918.

Mr. J. W. Dunfee,

Hornsilver, Nevada.

Friend Will: Your letter of the 14th received and contents carefully noted. Now would say in regard to this mine, it is my opinion and all of the stockholders here, that under the present war con-

ditions we are only sacrificing every bit of the ore we are taking out of the mine in keeping it running and we are not in favor of your putting up your money in running the property and placing the company under obligations and being indebted to you. Now, we have given this proposition a fair trial and after we have moved \$60,000 or \$75,000 worth of ore and with no results to yourself or anyone else (except to the mill people) and also in view of the fact that we have done a very large amount of work more than our lease calls for, we are certainly entitled to close this property down until the end of the war, when we can do something with a fair chance of getting some returns for our investment—besides the experience.

Also whether the mill closes down or not, it is my advice representing fifty per cent of the stock, that we close down without further delay or sacrificing any more ore or money. We have been faithful and honest and put up our money when it was needed and we are going from now on to have something to say about it. . . .

Now regarding the legality of Mr. Curn who insists on the return of his investment. This is a small matter, and the only way to keep the company out of trouble is to pay it. I have the law on this matter and know it is legal, and it will make a lot of talk and trouble if he takes legal action on it, which he will certainly do if the company don't pay it. His name is Velvin Curn, and you can make the check out to him and mail it to me and I will

at once secure his stock properly indorsed and mail to you for cancellation.

We must remember that four of our stockholders who are in our company are fighting in France now, and you, Judge Edwards, myself and the French Company are in duty bound to protect them and to see that their investment, which they have entrusted to us, is absolutely bona fide. Now let me hear from you as soon as possible. Kind regards to yourself and Judge. I remain,

Yours very truly,

C. A. TERWILLIGER.

That thereafter this defendant, pursuant to said demand, and as president and general manager of the Orleans Company, [16] discontinued all work, and on the 6th day of November, 1918, notified plaintiff and his said associates in writing that all work had been discontinued, under said lease. That on the 11th day of November, 1918, defendants Dunfee, Ellsworth and Edwards convened as the board of directors of said company; that this defendant submitted said demand and his action thereon to said board and said board then and there adopted the following resolution, to wit:

It appearing to the satisfaction of the Board that the Company was without funds, it was duly moved and seconded that said statement be accepted and the lease be closed down according to the request of Terwilliger in said letter contained.

III.

Answering paragraph V, this defendant denies

that defendants or any of them as directors or stockholders or director or stockholder or otherwise knowingly or at all caused or committed, connived at or approved, the alleged wrongs complained of or any wrongs or wrong, or that plaintiff or any stockholders or stockholder similarly or otherwise situated have been or were or are or is unable to have said alleged or any wrongs or wrong righted or to obtain any and all redress by action of said board of directors or by appeal to the stockholders of the Orleans Company or by any appropriate means. Avers that plaintiff and his said associates have never, nor has any of them ever, by request, demand or otherwise, sought to have any alleged wrong redressed by or through said board of stockholders, or been by any act or omission of defendants or any of them prevented or hindered therefrom. [17]

IV.

Answering paragraph VI defendant avers that he has no information or belief as to whether or not, at the time that the agreement set forth in said complaint was made, all ground surrounding the mining claims described in said complaint for a distance of 2,000 feet or more or any distance was located and held in private ownership by third parties and none thereof was for sale, which condition was a continuing one, all of which was known to and understood by plaintiff, and putting his denial on that ground denies the same; denies that said condition was known or understood by this defendant; denies that plaintiff was or remained wholly

unfamiliar with the subject matter of said lease or wholly or at all unfamiliar with extension or renewal conditions thereof, or wholly trusted or depended upon this defendant or believed or relied on his statements that he alone could obtain such extensions or renewals or that he would obtain the same for the use and benefit of said company whenever deemed desirable or necessary; denies that defendant stated to plaintiff or at all, or that it is a fact, or that plaintiff believed, that this defendant alone could obtain such extensions or any extensions, or would obtain them, or might obtain them save in the event that the lessee performed all of the terms of said lease on his or its part to be kept and performed; avers that two extensions of said lease were personally applied for and obtained by plaintiff alone. Denies that this defendant represented to or assured plaintiff, because of long acquaintance or friendship or otherwise, or that this defendant represented to or assured plaintiff at all, that plaintiff could implicitly or otherwise trust this defendant, or represented to [18] or assured plaintiff that this defendant would never be other than absolutely honorable with an old friend; denies that plaintiff relied upon said alleged or any representation, or anything except said written contract until said corporation was formed; denies that plaintiff relied upon said or any representations or on said contract after said corporation was formed; denies that this defendant was ever other than absolutely honorable and trustworthy with plaintiff or than as an old friend. Avers that said written

agreement was by the parties thereto intended to merge and supersede all of the word-of-mouth negotiations preceding the making thereof.

V.

Answering paragraph VII this defendant denies that any of said 600,000 shares were by this defendant or the Orleans Company delivered to persons associated with plaintiff, but avers that plaintiff sold part of the 300,000 shares allotted to plaintiff to persons associated with him.

VI.

Answering paragraph VIII this defendant denies that he had at all or any times or time full or exclusive charge, control or management of all or singular or any of said business from thence hitherto or at all; avers that he acted as director, president, treasurer and general manager subject to the articles of incorporation, by-laws and the resolutions of the board of directors of said company and not otherwise. Denies that he acted for said company in any capacity or at all after May 30, 1919. Avers that on and after said date said company was without assets or business and was to all intents and purposes dead. Denies that the mine showing [19] continued to improve or improve at all after the service by plaintiff upon defendant of the letter demand hereinbefore set forth or until April, 1921, as hereinafter set forth. Denies that from or according to report or reports issued by this defendant or anybody, or in fact, large or valuable bodies or body or deposits or deposit of or any ore were or was discovered after

said demand by means of the money paid in by plaintiff or anybody or at all except as aforesaid; denies that plaintiff or anybody paid in any money, or that from or according to such reports or report, or in fact, large or frequent shipments or shipment or any shipment were or was made from time to time or at all until in and after July, 1921, or that from or according to such reports or report, or in fact, the prospect for a large or paying mine, or any prospect, was in March, 1920, or ever after the receipt of said demand, or until over a year after the expiration of said lease, more favorable or any different. That when said demand was received by this defendant and acted upon by the Orleans Company as aforesaid the mine showing was, and this defendant, on the 6th day of November, 1918, notified plaintiff and his said associates that it was as follows: None of the ore then in sight could be worked at a profit; all other ore had been pretty well worked out, and the success of the mine in the future required proper development to disclose the ore bodies that diligence and perseverance would no doubt disclose. That the Orleans Company never, after the receipt of said demand, performed any work under said lease or at all and has never thence hitherto had any funds or means whatever. That said demand has never by plaintiff or any of his said associates been withdrawn. That said resolution acting on [20] the same has never been repealed or rescinded; that no meeting of the board of directors or of the stockholders of the Orleans Company has been held since 11th day

of November, 1918, or been demanded or requested by plaintiff or any of said associates or any attempt made by plaintiff or said associates to finance said company or resume work under said lease or at all. That within thirty days after the receipt of said demand and action taken thereon by said board the local custom mill at Hornsilver, on which the Orleans Company relied for the treatment of its ore, went out of business and began to dismantle its plant. That this defendant, by letter dated January 31, 1919, notified plaintiff of the closing of said mill, called plaintiff's attention to the above-mentioned report covering mine conditions, told plaintiff that as plaintiff had ordered the mine shut down it was up to plaintiff to start it, and asked plaintiff to make suggestions touching the future financing of the company. That plaintiff ignored said letter. That on the 30th day of May, 1919, said lease was by the lessor revoked and cancelled for failure on the part of the Orleans Company to perform the required amount of work, and was never thereafter renewed.

VII.

Answering paragraph IX this defendant denies that in March, 1920, or ever he conceived or had the intent or purpose to, or that he did, cheat or defraud the Orleans Company out of its said alleged or any leasehold estate or property or anything, or cheat or defraud plaintiff or others or other stockholders or stockholder similarly or otherwise situated or at all out of the value of their stock in said corporation or anything; denies that in

March, [21] 1920, or at any time since May 30, 1919, said stock was or that it is of any value; denies that he obtained a lease from said French Company with the fraudulent or any intent or purpose to, or that he did thereby or at all, obtain or appropriate to his own use anything owned by or of value to the Orleans Company or plaintiff or his said associates or said stockholders or stockholder, or to which they or any of them were or was or are or is entitled, or that he secretly negotiated for or obtained the same, or as director, president, treasurer, general manager or other officer or trustee of the Orleans Company or in exclusive or any charge of its business or operations or operation, or pursuant to any corrupt or fraudulent purpose, or that he had exclusive or any charge of its business or operations or operation or had any such purpose; denies that he attempted wholly or at all to exclude said company from any ownership or any right or interest in said lease or possession, or that it had any, or by causing said lease to be assigned or delivered to defendant Orleans Hornsilver Mining Company, hereinafter called the Hornsilver Company, or as president, treasurer, general manager or other officer or agent of the Orleans Company, or that he delivered possession to said Hornsilver Company, or permitted it to take possession, of any property, real or personal, of the Orleans Company, or that then or thereby said Orleans Company was ejected or ousted from any property or possession or at all. Denies that the consideration for said assignment was or is the sum of

\$50,000 or any sum of money in excess of \$40,000. Denies on information and belief that said Hornsilver Company had full or any knowledge or notice of all or singular the said alleged facts or fact, circumstances or circumstance. Avers that as to when plaintiff or any other stockholders or [22] stockholder similarly or otherwise situated made discovery of said alleged facts or circumstances this defendant has no knowledge or information upon which to base a belief, and he therefore denies that plaintiff and said stockholders had no such notice or knowledge until in or about July, 1921. Avers that in April, 1919, this defendant, by letter of said date, notified plaintiff that said lease would expire by its own terms on May 31, 1919, and that said lessor company did not purpose renewing the same unless work was resumed thereon. Avers that the said lease and the fact of the cancellation thereof have been, since May 30, 1919, of record in the office of the Orleans Company in Goldfield, Nevada, in the possession of defendant Edwards as secretary of said company, and that neither plaintiff nor any of said stockholders applied at said office or to said secretary or to this defendant for any information concerning the same. As to whether plaintiff at once or ever employed counsel to institute appropriate or any legal proceedings or proceeding on behalf of the Orleans Company this defendant has not sufficient knowledge or information upon which to base a belief, and therefore and on that ground denies that counsel was employed for said purpose.

Denies that plaintiff is ready or is able to do equity in the premises.

VIII.

Further answering paragraph IX defendant avers that for over a year after the cancellation of said lease this defendant devoted his exclusive attention to other enterprises in places other than Hornsilver and that during said time said leased property remained wholly idle and in the possession and under the control of the lessor company. That in February, 1920, plaintiff Terwilliger wrote [23] this defendant asking about said leased property. That in March, 1920, this defendant wrote plaintiff that, after traveling over the state, he, this defendant, believed said property was the best property in the state and that if plaintiff would come to Goldfield, Nevada, and see defendant Edwards as the attorney-in-fact of the lessor company, and would put up some money for operations, he, this defendant, and plaintiff could obtain a new lease. That on May 2, 1920, plaintiff replied to said letter as follows, to wit:

4419 Finley Ave., Los Angeles, Cal.

May 2, 1920.

J. W. Dunfee,
Goldfield, Nev.

Friend Will:

Your letter of some time ago received and I have been away, hence delayed in replying to same. When will you be in Los Angeles to confer with me regarding this matter of the Orleans property. I would not attempt to do any business through the

mail, as I consider it would be time wasted. I expect to be here from now on. Very glad to hear your health is so much improved.

Yours very truly,

C. A. TERWILLIGER.

That neither this defendant nor the Orleans Company ever thereafter heard from or of plaintiff or any of his said associates until after the consummation of the deal sought to be set aside in this action. That in June, 1920, this defendant resumed prospecting operations on said property on his own behalf under a written lease between said lessor company and this defendant and performed work thereunder in June, July and August, 1920, amounting to 54 shifts, wholly at his own risk and expense. That prior thereto parts of the hoist, the gas-tank, and all movable mining and blacksmith tools had been stolen; that this defendant replaced the same at a costs to him of \$1,000. That this defendant then tried to interest [24] one A. I. D'Arcy, afterwards promoter of the Hornsilver Company, in said lease, and offered the same to him for \$6,000. That said D'Arcy, after a careful expert examination of said property, declined to consider said or any offer. That this defendant then, at his own expense, in about August, 1920, performed about 52 additional shifts of work on said property. That this defendant spent the month of September, 1920, in Los Angeles, California, trying to finance said lease; that he wholly failed so to do, and in October, 1920, returned to Goldfield and surrendered said lease to said lessor company for cancellation and

the same was cancelled then and there. That late in December, 1920, defendant Edwards, as attorney-in-fact for said lessor company, persuaded this defendant to resume operations on said property, and this defendant resumed operations thereon under an unwritten understanding with defendant Edwards as such attorney-in-fact that he, this defendant, could have a lease and bond on said property if he wanted it. That thereafter in said month defendant procured one Gordon Bettles to take an option on this defendant's said prospective leasehold and bond rights for \$2,000 cash and 20 per cent of production. That this defendant was then \$2,000 in debt incurred in trying to open up and finance said property and was without means. That said Bettles, after an examination of said property, failed to exercise said option. That in said month this defendant borrowed \$75 with which to resume operations on said property and resumed operations thereon. That in January, 1921, this defendant procured one William Sirbeck to take a 14-day and later a 30-day option on said prospective leasehold and bond rights at \$2,500. That said Sirbeck, after examining said property, failed to exercise said option. That [25] while said options were pending this defendant continued work on said property at his own expense. That in March or April, 1921, this defendant procured the Tonopah Mining Company to take a 30-day option at \$20,000 and 20% of production; that said Tonopah Mining Company put a crew of men to work exploring and sampling said property. That this defendant there-

upon demanded the written lease and bond promised him by defendant Edwards as attorney-in-fact and the same was given him and dated back to January 1, 1921, to cover the time that this defendant had been operating under said unwritten understanding. That said lease and bond is the lease and bond involved in this action. That said Tonopah Mining Company continued its prospecting work on said premises for five weeks and then declined to exercise said option. That this defendant in May, 1921, again tried to interest said D'Arcy but was unable to do so principally because of the refusal of said Tonopah Mining Company to exercise its said option. That this defendant continued to operate said property at his own expense, working alone on the 600-foot level, performing about 70 feet of lateral work and 24 feet of raise, in the course of which this defendant discovered 4 feet of ore assaying \$60 and breaking down at \$34 per ton. That by means of said discovery this defendant induced said D'Arcy to enter into the transaction involved in this action. That after said discovery and pending negotiations with said D'Arcy this defendant shipped several carloads of ore the proceeds of which netted him about \$5,000. That after realizing said sum this defendant was still out-of-pocket about \$1,000 on account of his outlays in opening up and marketing said property, [26] exclusive of the value of his own time and labor. That neither plaintiff nor any of said other stockholders made any claim, for themselves or on behalf of the Orleans Company, to any right or interest.

in said property or any lease thereon after May 30, 1919, or until the 2d day of August, 1921, after said deal was made with said D'Arcy, and never contributed or offered to contribute toward this defendant's work and expenses done, incurred and laid out after May 30, 1919. Denies that the Jan. 1, 1921, lease was a modification, extension or renewal.

IX.

Avers that by reason of the premises this action is barred by the gross laches and negligence practiced and suffered by plaintiff and said other alleged stockholders.

WHEREFORE, This defendant prays that plaintiff's prayer be wholly denied and that this defendant have judgment for his costs, and general relief.

AUGUSTUS TILDEN,
Attorney for Defendant Dunfee.

State of Nevada,
County of Washoe,—ss.

J. W. Dunfee, being first duly sworn, deposes and says: That he is the defendant above named; that he has read the above and foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated or denied on information and belief or want of information or belief, and as to those matters that he believes it to be true.

J. W. DUNFEE.

Subscribed and sworn to before me this 25th day of May, 1922.

[Seal]

WM. McKNIGHT,
Notary Public. [27]

[Endorsed]: Filed May 26, 1922.

Receipt of a copy of the within answer of J. W. Dunfee this 25th day of May, 1922, is hereby admitted, and said defendant's time to file same is hereby extended three days.

COOKE, FRENCH & STODDARD,
Attorneys for Plaintiff. [28]

[Title of Court and Cause.]

DECISION.

(Appearances.)

There was a written agreement between defendant Dunfee and the plaintiff Terwilliger, providing for the operation of certain mining claims in Horn-silver Mining District, Esmeralda County, Nevada. The property belonged to a French company, for which defendant Edwards was the local agent and attorney-in-fact. At the time the agreement was executed, September 2, 1916, Dunfee held a lease on the premises effective until May 31, 1917. He represented to Terwilliger that he was on such intimate terms with Edwards that he could procure in his own name renewals and extensions of the lease when he desired. The agreement provided that Dunfee should give Terwilliger a 50% interest in the lease, and on his part, Terwilliger was to raise

\$8,000; \$3,000 of which was to be paid to Dunfee, and the remaining \$5,000 to be used for development of the property. It was also stipulated that Terwilliger should advance necessary funds to organize a corporation to take over and operate the leased property. It was further stipulated that the money so advanced should be returned to him when the \$5,000 was raised. There was a further provision that if in the future it became advisable to sell stock to raise more money for development purposes, the stock so disposed of should be taken share for share from the holdings of Terwilliger and Dunfee respectively; and that if either desired to sell his [29] stock it should be optional with the other to furnish one-half of the stock so sold. Accordingly the defendant Orleans Mining and Milling Company was organized, with a capital stock divided into one million shares having a par value of one dollar each. The lease was turned over to the company, and in consideration all the stock was issued to Dunfee; 300,000 shares he retained for himself, giving an equal amount to Terwilliger, and depositing 399,000 shares in the treasury of the company; 1,000 were issued to the defendant Edwards. Dunfee, Terwilliger and Edwards became and were directors of the corporation; Dunfee was president, general manager and treasurer; Terwilliger, vice-president and secretary. In order to raise the \$8,000, Terwilliger sold 33,000 shares of his own stock to various persons, most of whom resided in Imperial Valley, California. Prior to the agreement the mines had produced about \$85,000, and

thereafter under the Orleans Mining and Milling Company, prior to November 8, 1918, during a period of two years and two months, the gross yield was \$65,000. About this last date, by consent of all parties, operations on the property ceased. It was the unanimous opinion that under prevailing war prices and conditions, work could not be continued at a profit. The original lease was from year to year, and required 60 shifts of work per month. In 1919 it was renewed for another year, and expired June 1, 1920. On the 5th day of the same month a new lease on somewhat different terms was taken by Dunfee in his own name. This he held until October of the same year, when he surrendered it after doing some 137 feet of work. Later, about January 1, 1921, he took another lease, also in his own name, and again worked in the mine. July 18, 1921, he sold his lease for \$40,000 and 150,000 shares of stock of the Orleans Hornsilver Mining Company.

The correspondence in relation to shutting down the [30] mine and the attendant circumstances, indicate that it was intended, not as an abandonment, but only as a temporary suspension of operation until mining conditions improved. As to the requirement of 60 shifts of work per month under the lease, the testimony of Mrs. Terwilliger is that Edwards agreed with the plaintiff Terwilliger in her presence that excess work done on the property up to the time of the shut-down should apply on future work required under the lease. September 30, 1918, writing to Dunfee, Terwilliger says:

“It is my opinion and all of the stockholders here that under the present war conditions we are only sacrificing every bit of the ore we are taking out of the mine in keeping it running. . . . In view of the fact that we have done a very large amount of work more than our lease calls for, we are certainly entitled to close this property down until the end of the war, when we can do something with a fair chance of getting some returns for our investment. . . . We must remember that four of the stockholders who are in our company are fighting in France now, and you, Judge Edwards, myself and the French company are in duty bound to protect them and see that their investment, which they have entrusted to us, is absolutely *bona fide*.”

The mine was self-sustaining. When operations were suspended the company was free from debt. Furthermore, there is no evidence that any money, other than that raised by Terwilliger in addition to the earnings of the mine itself, was necessary to pay expenses.

In the report issued to the stockholders August 1, 1918, by Dunfee, Terwilliger and Edwards, they said:

“The present prospects of the mine are good, as on the 600-foot level after encountering some bad luck on the 400 and 500 foot levels in finding a leached-out condition and ore of [31] so low grade as hardly to bear treatment under present conditions, we have

uncovered a fine body of ore, running from \$45 to \$50 per ton in the better class of it, with a large amount of ore of \$15 to \$25 per ton.

“The owning company has given its consent in writing directing Mr. E. Carter Edwards to extend the lease for another year, that is to June 1st, 1920, which will be done.

“The company has also kept in mind the development of the property, and the ore mined has been milled at the nearby mill at Hornsilver, and the proceeds used in development work and payment of bills, and the deeper developments have been very encouraging as above stated.

“The company has also an option to purchase the property leased from the owning company, which can be exercised at any time we deem it practicable.”

In the report as president and general manager, dated November 6, 1918, Dunfee says:

“The conditions have been so unfavorable, owing to the war, high prices, and inefficiency of labor, that it has been deemed best to close down the mine. The mine is entirely free from debt, and no trouble can come from creditors, as there are none. As to the future of the mine, will make the following recommendations:

“Extend the east drift on the 600-ft. level to the east. On the drift on this level we have been in a big body of low grade quartz for the last 150 feet, with a small rich seam laying

in the quartz. At time of closing down mine, have not encountered pay ore shoot in the drift to the east as we had expected from the rake of the shoot from the upper levels. Indications are good for the shoot still to come in. To the west drifted 65 ft. on the 600 level. From a winze at this point I took last shipments and found some very rich ore at bottom of winze. Owing [32] to high cost of mining, etc., could not underhand-stope this ore out at a profit."

March 26, 1920, in a letter to Terwilliger, Dunfee says he had looked the state over, and there was a better chance on the Orleans than anything he had seen.

It is impossible to find there was on the part of Terwilliger, or any of the stockholders, any intention to abandon the enterprise. Until July, 1921, Terwilliger knew nothing of the sale, or that Dunfee claimed to be sole owner of the lease. No notice of such was ever, prior to that date, given by Dunfee or Edwards to Terwilliger. Dunfee's mining appears to have been on the six or seven hundred foot level of the mine, and was not of a character to attract attention. Taking the lease in his own name was not unusual, as previous leases, extensions and renewals had been to Dunfee and in his name. In this respect those subsequent to June 1, 1920, did not differ from previous leases, and were insufficient to inform plaintiffs that Dunfee was holding or claiming adversely. In July, 1921, Terwilliger employed an attorney who withdrew in

the following March. The complaint was filed April 3, 1922.

The prayer of the complaint is (1) that the lease be decreed to be the sole property of the Orleans Mining and Milling Company, and that in obtaining it Dunfee acted in all things as trustee for the use and benefit of said company; (2) that the Orleans Hornsilver *Ming* Company be decreed to have no interest in the leasehold estate, and that it be required to surrender possession to the Orleans Mining and Milling Company, and to account for any and all ores by it mined and extracted while it was in possession; (3) that plaintiff recover its costs from Dunfee and the Orleans Hornsilver Mining Company; and (4) that plaintiff have such further relief as to the Court may seem proper.

Before the trial the cause was dismissed as to the defendant [33] Orleans Hornsilver Mining Company, whereupon Dunfee moved that the case be dismissed as to him also. The theory was that inasmuch as plaintiff had in his bill disavowed the sale and demanded surrender of the property sold, he had made an election which precluded further proceedings in which he might affirm the sale and demand the proceeds received by Dunfee. The motion was overruled.

When Terwilliger discovered that Dunfee, claiming to be the sole owner of the lease, had sold it to the Orleans Hornsilver Mining Company, two remedies were available; he could claim the sale was infected with fraud in which the purchaser par-

ticipated, or of which it had notice, and ask that the sale be set aside and the property surrendered to the Orleans Mining and Milling Company; or he could affirm the sale and demand the proceeds. True, the remedies would be inconsistent, but in Equity Rule 25 it is expressly declared that in the prayer, relief may be sought and stated in alternative form. Alternative means "mutually exclusive." (Cent. Dic.; *Boyd vs. New York & H. R. Co.*, 220 Fed. 174, 179.) The prayer in equity usually is an expression of plaintiff's opinion as to the specific assistance to which he is entitled; but he may be mistaken, hence it has been the practice of cautious pleaders to ask also for general relief. The alternative forms of relief may be contradictory, but that circumstance is not fatal, provided the alternative relief is consistent with the facts alleged in the bill.

In the complaint there is no specific alternative prayer that Dunfee be adjudged to be a trustee as to the consideration received by him for the assignment of the lease, and that he surrender the same to the Orleans Mining and Milling Company; but the facts alleged, if true, are sufficient to support such a decree; and this is so without adding to or subtracting from anything in the bill. It would also be true whether the Orleans Hornsilver Mining Company was an innocent [34] purchaser or not. In the prayer this alternative is demanded, if at all, in the request for general relief. In either respect, the case is based on the alleged trust relationship of Dunfee to the Orleans

Mining and Milling Company, and his fraudulent sale to the Orleans Hornsilver Mining Company. There is no claim that he was taken by surprise when as to the last-mentioned corporation the case was dismissed, or that in consequence he changed his position to his detriment. The wrong done and the cause of action remain the same, notwithstanding the dismissal of the Hornsilver Mining Company. Dunfee is still a necessary and a proper party. By placing the property in the hands of an innocent purchaser, he put it beyond the reach of the Court, and consequently the prayer that it be restored is of no avail. But it does not follow that the plaintiff must be denied the alternative relief to which he is obviously and justly entitled, because instead of praying specifically for the proceeds of the sale, he has asked such other and further relief as the equities of the case may warrant, and which to the Court shall seem just and proper.

“There is nothing,” says Justice Peckham in *Lockhart vs. Leeds*, 195 U. S. 427, 436, “in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief under the general prayer, to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief, and upon a somewhat different theory from that which *which* is advanced under one of the special prayers.”

In *United States vs. Frick*, 244 Fed. 574, af-

firmed in 255 Fed. 612, the prayer was that a patent obtained by fraud be set aside, the land restored to the public domain, and also that the plaintiff have such relief as may accord with the [35] principles of equity. Frick, by whose fraudulent practice the patent had been obtained, purchased from the patentee, and thereafter sold to a *bona fide* purchaser for value. The sale was made, the deed recorded, and the transaction called to the attention of the complainant before its bill was filed; nevertheless it was held that under the general prayer for relief the value of the land could be recovered.

Similar cases are *Cooper vs. United States*, 220 Fed. 867, and *United States vs. Debell*, 227 Fed. 760.

Dunfee's claim that the case against him should be dismissed because plaintiff had elected to pursue a different and an inconsistent relief, is without merit.

During the entire period from the organization of the Orleans Mining and Milling Company to and including the date the lease was sold, Dunfee was the president, treasurer, and general manager of the corporation; he and Edwards were two of its three directors, and they held more than half of the issued capital stock. While Dunfee was so acting for the company he discovered the ore mentioned in his report of August, 1918, and he also learned where more could probably be found. About \$5,000 above the earnings of the mine had been expended in so doing, and this money had

been procured from persons to whom Terwilliger had sold stock of the company. Dunfee had himself received \$3,000 from the same source; he was occupying a confidential and a fiduciary relation to the Orleans Mining and Milling Company and its stockholders, and must be held, under all the authorities, to the utmost good faith in dealing with them. Terwilliger and the other stockholders hoped and expected that a renewal of the lease would be obtained for their company; they were amply justified in believing and relying on Dunfee's assurance that he could and would procure further extensions. This hope or expectance of renewals, under all the [36] authorities, and as against Dunfee and in favor of Terwilliger and the Orleans Mining and Milling Company, was a valuable property right, and this was true even though there was no enforceable right to a renewal of the lease.

Robinson vs. Jewett, 116 N. Y. 40, 22 N. E. 224-6-7.

McCourt vs. Ginger-Beggars, 145 Fed. 103, 108.

Johnson's Appeal, 2 Am. St. Rep. 539.

Davis vs. Hamlin, 48 Am. Rep. 541, 544.

3 Pom Eq. Jurisp., sec. 1050.

In Mitchell vs. Reed, 119 Am. St. Rep. 252, 65 N. Y. 123, a partnership, formed to continue until a certain date, leased premises to expire at the same date, and made valuable improvements thereon; during the term one partner, without the knowledge of the other, took a renewal of the lease

in his own name for a term to begin at the expiration of the partnership term. It was held that the new lease inured to the benefit of the firm, and the partner was in equity a trustee of the lease for the partnership.

In *Largarbe vs. Anniston Lime & Stone Co.*, 28 So. 199, the defendants, who were respectively president and secretary of the corporation, knowing that the corporation had a lease on certain land and contract for the purchase, bought the land for their own use. It was held that this was a breach of the trust arising out of their fiduciary relations, and that they were trustees of the property for the benefit of the corporation.

See, also, the *Pike's Peak Co. vs. Pfunter*, 123 N. W. 19, and cases cited above.

The evidence in the present case clearly shows that the lease was acquired by Dunfee in violation of his duty to the corporation, and without the knowledge or consent of the Orleans Mining and Milling Company for whom he was acting; hence he must be held as a trustee, and as such it is found that he [37] holds the 150,000 shares of stock and the \$40,000 in money received by him from the sale of the lease in question, in trust for the plaintiffs.

Let a decree be entered in accordance with the foregoing opinion.

[Endorsed]: Filed October 7th, 1925. [38]

In the District Court of the United States in and
for the District of Nevada.

IN EQUITY—No. B-39.

C. A. TERWILLIGER, on Behalf of Himself and
All Other Stockholders of the ORLEANS
MINING AND MILLING COMPANY, a Cor-
poration, Similarly Situated,
Plaintiffs,

vs.

J. W. DUNFEE, ORLEANS MINING AND
MILLING COMPANY, a Corporation, J. W.
DUNFEE, E. CARTER EDWARDS and
CHARLES ELLSWORTH, Directors of Said
Corporation, and ORLEANS HORNSILVER
MINING COMPANY, a Corporation,
Defendants.

JUDGMENT AND DECREE.

This cause came on to be heard on December 1, 1922, and thereafter was argued by counsel and submitted to the Court, and thereupon and upon consideration thereof the Court made and filed its written decision and opinion herein, and thereafter the Court made and filed its findings of fact and conclusions of law herein and ordered that a decree in accordance therewith be entered herein.

IT APPEARING TO THE COURT that the defendant J. W. Dunfee received one hundred and fifty thousand shares of the capital stock of the Orleans Hornsilver Mining Company, a corpora-

tion, and Forty Thousand Dollars in money, all of which shares of stock and money was received by said defendant J. W. Dunfee as trustee for the use and benefit of plaintiffs, and that said one hundred and [39] fifty thousand shares of stock and said Forty Thousand Dollars was and is the property of and belongs to said plaintiffs.

NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED that said defendant J. W. Dunfee pay and deliver over to the plaintiffs above named the said sum of Forty Thousand Dollars, and it is—

FURTHER ORDERED, ADJUDGED and DECREED that on or before December 10th, 1925, the said defendant J. W. Dunfee deliver to plaintiffs the said one hundred and fifty thousand shares of the capital stock of said Orleans Horn-silver Mining Company, and it is—

FURTHER ORDERED and ADJUDGED that plaintiffs have judgment against the said defendants J. W. Dunfee and E. Carter Edwards, and each of them, jointly and severally for plaintiffs' costs and disbursements of this suit, taxed at the sum of \$84.40.

Done in open court this 16th day of November, 1925.

E. S. FARRINGTON,
District Judge.

Service of the within by copy admitted November 7, 1925.

AUGUSTUS TILDEN,
Attorney for Deft. J. W. Dunfee.

[Endorsed]: Filed this 16th day of November, 1925. [40]

[Title of Court and Cause.]

PETITION FOR APPEAL AND ORDER
GRANTING SAME.

Filed ———, A. D. 1926, in the District Court of the United States for the District of Nevada. To the Hon. E. S. FARRINGTON, District Judge, etc.:

The above-named defendant, J. W. Dunfee, feeling himself aggrieved by the decree made and entered in this cause on the 16th day of November, 1925, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

AUGUSTUS TILDEN,
JNO. F. KUNZ,
Attorneys for Petitioner.

ORDER.

The above petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of One Thousand Dollars.

E. S. FARRINGTON,
Judge of the United States District Court, District
of Nevada. [41]

[Endorsed]: Filed May 7, 1926, 3:35 P. M.

Receipt of a copy of the within this 7th day of May, 1926, is hereby admitted, reserving all valid objections.

COOK & STODDARD,
Attorneys for Plff. [42]

[Title of Court and Cause.]

SPECIFICATION OF ERRORS.

Comes now defendant J. W. Dunfee, by his attorneys, Augustus Tilden and J. F. Kunz, and in connection with his petition for allowance of appeal herein, says that the decree entered in the above-entitled cause on the 16th day of November, 1925, is erroneous and unjust to said defendant for the reasons following, to wit:

1. Said decree is erroneous and contrary to the pleadings in this, that plaintiff's complaint sets forth facts which, if true, entitle him, if anything, to a decree adjudging, and plaintiff in the prayer of his complaint specifically prays judgment, that the Orleans Mining & Milling Co. is the owner and

entitled to the possession of a certain mining lease dated June 5, 1920, and the leased premises, and a certain "modification, renewal and extension" thereof dated January 1, 1921, whereas by its said decree the Court adjudged that certain 150,000 shares of stock and \$40,000.00 in money were received by defendant Dunfee as trustee for plaintiff and that he deliver and pay the same to plaintiffs. [43]

2. Said decree is erroneous, unsupported by the pleadings, and contrary to the evidence, in this, that the complaint charges that defendant Dunfee sold said lease to the Orleans Hornsilver Mining Co. upon the agreement of the latter to "pay to said defendant Dunfee, in installments from time to time an aggregate of \$5,000.00 in cash and 150,000 shares of its capital stock"; the evidence shows without conflict that said money consideration was \$40,000.00 payable in installments, of which but \$20,000.00 had been paid; nevertheless the said decree adjudges that defendant Dunfee pay and deliver over to plaintiff \$40,000.00 without deduction.

3. Said decree is erroneous, unsupported by the pleadings, and contrary to the evidence, in this: that it adjudges that defendant Dunfee received said stock and money as the purchase price for a lease in which the Orleans Mining & Milling Co. was interested as lessee, whereas the evidence shows without conflict that the only lease in which said company was interested, to wit: the lease of June 19, 1915, expired by its own terms on May 31, 1920, and was moreover expressly cancelled by the lessor

on May 30, 1920, for the total failure of the lessee for over nineteen months to perform any condition thereof.

4. Said decree is erroneous, unsupported by the pleadings, and contrary to equity and the evidence, in this: that it adjudges that defendant Dunfee, as an officer of the Orleans Mining & Milling Co., received said stock and money as the purchase price of a lease in which said company was interested, whereas the evidence shows without conflict that after the lease owned by said company expired by forfeiture on May 30, 1920, and by lapse of time on May 31, 1920, defendant Dunfee, on June 5, 1920, took in his own name and right a new lease which he abandoned in October, 1920, after several months' unsuccessful effort at his own expense, labor and risk to discover commercial ore thereunder; that in [44] January, 1921, he reluctantly, at the instance of the lessor, re-entered the premises under a parol tentative arrangement with the lessor that if, after further exploration, he felt justified by the ore showing in requesting a written lease on better terms he could have it; that after several months further effort at his own risk, labor and expense he, in March, 1921, discovered ore justifying such request; that said parol tentative agreement was then consummated by the giving to him of a written lease dated back to the date of his last entry, to wit, January 1, 1921, and the same is the lease which he sold to the Orleans Hornsilver Mining Co. for said money and shares.

5. Said decree is erroneous, contrary to the evidence and against law and equity in this: that it necessarily implies a finding of fact and conclusion of law that because defendant Dunfee was the one-time active, and may be still the nominal, president, etc., of the Orleans Mining & Milling Co., he can forever be held to a duty to said company, while the said company, as shown by the evidence without conflict, wholly ceased since October, 1917, to function as a corporation, thereby wholly failing in its reciprocal duty to defendant Dunfee so to function.

6. The evidence shows without conflict that defendant Dunfee, as the owner of a leasehold estate in the Orleans mine, assigned the same to the Orleans Mining & Milling Co. on the express and implied condition that said company would keep said estate alive by operating and preserving said lease; that said company for over nineteen months wholly failed to perform said express and implied condition, for which reason said estate was lost both to it and defendant Dunfee; and said decree is contrary to the evidence and against law and equity in that it necessarily implies a conclusion of law that defendant Dunfee was not entitled in such circumstances to retake said estate in his own right as a measure of rescission. [45]

7. The evidence shows without conflict that the Orleans Mining & Milling Co. not only had no means with which to operate said lease or any extension thereof, but had no effectual or *bona fide* intention, willingness or ability to raise means therefor, and said decree is contrary to the evidence and against

law and equity in that it necessarily implies a conclusion of law that defendant Dunfee, as a large stockholder in said company (and, *a fortiori*, as the original owner of said lease), was not entitled in such circumstances to take a new lease of said premises in his own right as a measure of salvage of his investment in said enterprise.

8. The evidence shows without conflict that the Orleans Mining & Milling Co. never by any act or omission of any kind evinced or held a hope or expectancy of a renewal of said lease, but on the contrary, by all of its conduct or want of conduct showed that it had no such hope or expectancy, and said decree is contrary to the evidence and against law and equity in that it necessarily implies a conclusion of law that in the face of such circumstances a lessee is in effect to be conclusively credited with entertaining such hope or expectancy.

9. The averments of the complaint show, and the evidence shows without conflict, that if plaintiff personally (apart from his character as a stockholder and officer of the Orleans Mining & Milling Co.) held any hope or expectancy of a renewal of said lease, it was wholly based on the terms of the pre-incorporation agreement pleaded in the complaint, and that this hope or expectancy was further based upon an outspoken belief on his part that under said pre-incorporation agreement he was entitled to follow into defendant Dunfee's hands any interest that the latter might ever in any way acquire in the Orleans property, although he, plaintiff, might in the meantime have wholly disregarded

his reciprocal obligations under said pre-incorporation contract; moreover, the evidence shows without conflict that plaintiff, in this [46] belief, knowingly and deliberately disregarded his said reciprocal obligations, and knowingly and deliberately laid back with the avowed intention on his part, while himself doing nothing to further the enterprise, to assert a right to the fruits if Dunfee succeeded, and to shirk all responsibility for the risk, time, labor and expense if Dunfee failed; and the decree is contrary to the evidence, and against law and equity, in that it implies a conclusion of law that plaintiff in so acting is not barred by his laches and unclean hands.

10. The evidence shows (*not* without conflict) that Terwilliger knew from the first of Dunfee's independent activities; it shows *without* conflict, and by Terwilliger's own admission, that he knew of Dunfee's independent activities as early as July, 1921, the date on which Dunfee's sale to the Orleans Hornsilver Mining Co. became public; nevertheless he and his attorneys, without excuse or explanation of any kind pleaded or offered in evidence, delayed the commencement of this suit until March, 1922; and said decree is contrary to the evidence and against law and equity in that it implies a finding of fact and conclusion of law that plaintiff in so delaying is not barred by his gross laches.

11. Said decree is contrary to the evidence in this, that said decree implies a finding, and the Court in its formal findings, Par. I, finds, that the "mine showing (in the leased premises) continued

to improve so that in March, 1920, the prospect for a large and paying mine was much more favorable than previously, all of which was well known to and understood by said defendant Dunfee," whereas the evidence shows without conflict, and all parties admitted without reserve throughout the trial, that said mine was wholly inactive from October, 1917, until after May 31, 1919; and the evidence shows without conflict that during said period of over nineteen months the mine was falling into decay and dilapidation and its movable machinery was stolen. [47]

12. Said decree is erroneous and contrary to the pleadings and the evidence in this, that the same implies a finding (and the Court found in writing in its written decision) that the leased premises were, until May 31, 1919, self-sustaining, whereas the complaint, Par. VIII, and Par. I of the Court's formal findings, declare, and the evidence shows without conflict, that said premises were not self-sustaining.

13. Said decree is erroneous and contrary to the evidence in this, that it implies a finding, and the court in its formal findings, Par. I, finds that "said defendant Dunfee, having on or about March, 1920, conceived the intent and purpose of cheating and defrauding said Orleans Mining and Milling Company out of its said leasehold estate and property, and also to cheat and defraud plaintiff and other stockholders similarly situated out of the value of their stock in said corporation, and with the fraudulent intent and purpose to obtain and ap-

propriate to his own use and benefit the said property, on or about June 1, 1920, when said French Company's lease to the Orleans Mining and Milling Company expired, the said defendant, Dunfee, while still a director, president, treasurer and general manager of said Orleans Mining and Milling Company as aforesaid and in exclusive charge of its business and operations, did secretly negotiate for and later, to wit: on June 5, 1920, obtain from said French Company a lease of said mining claims," whereas the evidence shows without conflict that Dunfee's conduct was pursued fairly, without concealment, under a belief and *bona fide* claim of right justified by all of the circumstances, after every duty that he owed to the Orleans Mining and Milling Company had been performed, and at a time when he owed no duty whatever to said company.

14. Said decree is erroneous in that it runs to plaintiff personally instead of to the Orleans Mining and Milling Co., on whose behalf plaintiff, as stockholder, brings this suit. [48]

15. Said decree is erroneous and against equity in that, while it adjudges that defendant Dunfee, in acquiring and selling the lease of January 1, 1921, was acting for the Orleans Mining and Milling Company, it allows him nothing for his risk, time, labor and expense.

16. The Court erred in overruling defendant Dunfee's motion that said cause be dismissed as to him, made at the commencement of the trial, upon and after the voluntary dismissal of the cause as to

defendant Orleans Hornsilver Mining Co., said motion being made upon the ground that the dismissal of said dismissed defendant left no cause of action stated against defendant Dunfee, in this, that plaintiff by his complaint elected to seek to recover the Orleans lease and mine in kind from its purchaser, the Orleans Hornsilver Mining Co., thereby repudiating the sale by Dunfee, while by the dismissal plaintiff sought to abandon said election, reverse his position, ratify Dunfee's sale, and follow the proceeds into his hands; to which ruling defendant Dunfee duly objected and excepted.

16a. The Court erred, over defendant Dunfee's seasonable objection and exception, in admitting in evidence against him statements attributed by witness C. A. Terwilliger to E. Carter Edwards, said to have been made not in Dunfee's presence, and without circumstances binding Dunfee by Edwards' declarations, as follows:

The WITNESS.— . . . Referring to report of stockholders dated August 1, 1918, I was in Goldfield at that time and had a conversation with Mr. Dunfee or Mr. Edwards or both of them relative to the property and its condition, or what the prospects and future policy of the company would be. We had a conversation the first afternoon we went in to Mr. Edwards; that was, I think, August 1, 1918, or July 31, one of the two days. There were present Mrs. Terwilliger, Mr. Edwards and myself.

Q. And what if anything was said?

Mr. TILDEN.—Is that offered for the purpose of showing any [49] agreement not embodied in that August 1st letter?

Mr. STODDARD.—No, but for the purpose of showing the representations of Mr. Dunfee and Mr. Edwards to the plaintiff in this action, and his confidence in those statements upon which he relied subsequently.

Mr. TILDEN.—We object to any conversation between this witness and Mr. Edwards. There is no relation of any kind shown to exist between Edwards and Dunfee by which Dunfee would be bound by what Edwards said, and Edwards is not a party to this suit, at least he is not appearing as a party.

Mr. FRENCH.—He is one of the defendants.

Mr. TILDEN.—Well, he is not here defending.

Mr. STODDARD.—Mr. Edwards is one of the defendant directors of the company.

The COURT.—I will allow the testimony to go in, but it will go subject to the objection.

The WITNESS.—Mr. Dunfee was not present at this conversation. . . . Then we discussed the amount of work that had been done in excess of the amount of work that was called for in that lease, and he said that it would apply on the future extensions. . . .

18. The Court erred in admitting in evidence against defendant Dunfee statements attributed by witness Mrs. C. A. Terwilliger to E. Carter Edwards, made not in Dunfee's presence and without

circumstances binding Dunfee by Edwards' declarations, over defendant Dunfee's seasonable objection and exception, as follows:

The WITNESS.— . . . The first conversation took place in the office of Mr. Edwards in Goldfield the evening either of the 31st of July, 1918, or the 1st of August, 1918. Mr. Edwards, Mr. Terwilliger and myself were present.

Q. What, if anything, was said referring to the mining operations or to mining properties?

Mr. TILDEN.—Objected to on the ground defendant Dunfee was [50] not present, and no such connection is shown between him and Carter Edwards as would bind him by anything that was said. The same objection that was made previously, and your Honor took the testimony provisionally.

Mr. STODDARD.—Your Honor will recall that Mr. Edwards is one of the defendants in this action, that he is also secretary of the company, and likewise attorney-in-fact for the French Company, so any statements Mr. Edwards may have made relative to the issues of this case, or as to extensions, or any other matters involved in the issues of this case, I think would be material.

The COURT.—As long as Mr. Edwards is a defendant I do not very well see how I can refuse to admit this defendant.

Mr. TILDEN.—He is a mere formal defendant; he is a defendant merely by virtue of his

being a director of the company on behalf of which the action is brought. He is made a defendant to comply with the rule of pleading that when a dissenting stockholder begins a suit, he should make defendants those directors to whom he had unsuccessfully appealed to take action on behalf of the corporation in its own name. He is not affected by this action in the slightest degree.

The COURT.—Well, the testimony will be admitted subject to your objection made in behalf of Mr. Dunfee; I don't understand you make it any further?

Mr. TILDEN.—No, that is all.

The COURT.—Proceed.

The WITNESS.— . . . Mr. Edwards stated that the amount of excess work that the Orleans Company had done more than required by the lease would apply on future extensions of the lease. . . .

19. The Court erred, over defendant Dunfee's seasonable objection and exception, in admitting in evidence, through the witness A. I. D'Arcy the facts of the transaction whereby Dunfee sold the lease of January 1, 1921, as follows: [51]

Q. Was the transaction that you had with Mr. Dunfee with reference to this lease?

Mr. TILDEN.—This is objected to on the ground the cause of action relates to a certain lease made in the month of June, 1920; this is not the lease; this is a lease made months afterwards, and there is neither pleading nor

proof to connect the lease in question with the lease pleaded.

Mr. STODDARD.—There may be, if the Court please, a variance in this proof, and it may be necessary for us to amend our complaint to conform to the facts; I realize that.

Mr. TILDEN.—Well, that would not help, because there is nothing to bridge the gap between these two transactions. . . . The contract pleaded on calls for extensions or purchases thereto belonging; I will read the whole paragraph so that the meaning of “thereto belonging” will be clear (reads): “In consideration of the party of the first part giving to the party of the second part a fifty per cent interest in and to the Orleans Development Mining and Milling Company, consisting of a lease on the following five claims”—naming the claims—“together with all other extensions or purchases thereto belonging,” evidently meaning belonging to said lease, “said second party agrees to raise,” and so forth. There is no proof that this is an extension of the lease mentioned in this contract; in fact, upon its face it purports to be a totally new lease; there is no fact alleged and no fact introduced, why your Honor should disregard the legal aspect of it as a totally new lease, and give it an aspect that it does not bear, to wit, an extension. . . .

The COURT.—I will overrule the objection,

and the testimony will go in subject to a motion to strike it out.

Mr. TILDEN.—Will your Honor allow me an exception at this time, so I will not have to make the motion to strike?

The COURT.—Yes, you may have your exception now. [52]

20. The Court erred in allowing plaintiff, over defendant Dunfee's seasonable objection and exception, to amend his complaint, contrary to the evidence, and thereby materially departing from the cause of action stated in the complaint as filed, by changing part of the wording thereof to read: "Did secretly negotiate for and later, to wit, on June 5, 1920, obtain from said French Company a lease of said mining claims, and on or about January 1, 1921, obtain a modification, renewal and extension of said lease, and thereupon the said Dunfee"—as follows:

Mr. TILDEN.—We object (to the offered amendment) on the ground it is not justified by the showing made by the plaintiff. The only showing in this behalf is from the lips of Mr. Edwards, to the effect that this June 5th lease was surrendered in the fall of 1920, and was thereupon marked cancelled by himself, attorney in fact for the lessor company. The further objection is that it is a matter of construction as to whether or not anything is a modification, renewal or extension. There certainly is no evidence that lease number three was intended as a modification, renewal or extension, and if upon its face it was such, then it

speaks for itself, and becomes a matter of law as to what it is and its character. . . .

The COURT.—I will allow you to make the amendment. Of course it will be subject to the objection. . . . You make take your exception.

21. The Court erred, over defendant Dunfee's seasonable exception, in denying the latter's motion to dismiss made at the close of plaintiff's case, as follows:

Mr. STODDARD.—That is the plaintiff's case in chief.

Mr. TILDEN.—At this time defendant Dunfee moves for a dismissal on the ground that no equity is shown by the complaint, and none is shown by the evidence; and on the ground heretofore raised in the previous part of the trial, namely, that the dismissal [53] of the action as to the D'Arcy Company leaves no cause of action as to anybody. . . .

The COURT.—I will overrule the motion for the present.

Mr. TILDEN.—Your Honor will allow us an exception?

The COURT.—Certainly.

22. The Court erred, over defendant Dunfee's seasonable exception, in sustaining plaintiff's objection to a question propounded to defendant Dunfee seeking to establish the latter's good faith in taking the lease of June 5, 1920, as follows:

Q. When you took this lease of June 5, 1920,

what did you think as to whether or not Mr. Terwilliger had abandoned the enterprise?

Mr. STODDARD.—Object on the ground that it is incompetent, irrelevant and immaterial as to what he thought about it; it would not be any evidence and would not be binding upon Mr. Terwilliger or those that he represents; it would be a mental process uncommunicated to anybody.

Mr. TILDEN.—He is charged with fraud, and I think we have a right to purge him.

The COURT.—It does not seem to me that it is a very material matter, but I will let you put it in subject to the objection; the fact he thought they had abandoned it would not change the rights of the various parties in any way that I can see.

Mr. TILDEN.—Well, answer it subject to the objection.

A. Yes, I certainly thought they had abandoned it.

23. The Court erred in deciding said cause in favor of plaintiff and against defendant Dunfee.

24. The Court erred in rendering a decree in favor of plaintiff and against defendant Dunfee.

WHEREFORE defendant Dunfee prays that the said decree be reversed and the District Court directed to dismiss the bill.

AUGUSTUS TILDEN,
JNO. F. KUNZ,

Attorneys for Defendant Dunfee. [54]

[Endorsed]: Filed May 7, 1926, at 3:35 P. M.

Receipt of a copy of the within this 7th day of May, 1926, is hereby admitted, reserving all valid objections.

COOKE & STODDARD,
Attorneys for Plaintiff. [55]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, J. W. Dunfee, as principal, and Nevada Surety & Bonding Company, as surety, acknowledge ourselves to be jointly indebted to C. A. Terwilliger, appellee in the above cause, in the sum of One Thousand Dollars (\$1,000.00), as indicated by the Judge allowing the appeal, conditioned that, whereas, on the 16th day of November, 1925, in the District Court of the United States in and for the District of Nevada, in the above-entitled cause, a decree was rendered against the said J. W. Dunfee, and the said J. W. Dunfee having obtained an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit, and filed a copy thereof in the office of the Clerk, to reverse the said decree, and a citation directed to the said C. A. Terwilliger citinb and admonishing him to be and appear at a session of said Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, State of California, on the 4th day of October, 1926.

Now, if the said J. W. Dunfee shall prosecute his said appeal to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and effect.

J. W. DUNFEE,

Principal.

By JNO. F. KUNZ,

His Attorney-in-fact.

NEVADA SURETY & BONDING CO.,

[Seal]

By W. E. ZOEBEL,

Secretary,

Surety.

Approved May 7th, 1926.

E. S. FARRINGTON,

Judge, etc. [56]

[Endorsed]: Filed May 7, 1926, 3:35 P. M. [57]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Honorable E. O. Patterson, Clerk of the United States District Court, in and for the District of Nevada:

You are hereby requested to prepare and certify to the United States Court of Appeals of the Ninth Circuit, sitting at San Francisco, California, transcript on appeal in the above-entitled case, and defendant, J. W. Dunfee, hereby designates and indicates portions of the records, papers and files to be incorporated in the transcript on appeal, as follows:

1. Complaint.
2. Answer.
3. Decision.
4. Decree.
5. Statement of facts.
6. Petition for appeal and order granting same.
7. Assignment of errors.
8. Bond on appeal.
9. Waiver of citation.
10. Praecipe and proof of service thereof.

Dated: June 1, 1926.

AUGUSTUS TILDEN,
JNO. F. KUNZ,

Attorneys for Defendant, J. W. Dunfee. [58]

[Endorsed]: Filed this 2d day of June, 1926, at
9 A. M.

Service of the within, by copy, admitted this 1st
day of June, 1926.

COOKE & STODDARD,
Attorneys for Plaintiffs. [59]

[Title of Court and Cause.]

STATEMENT OF FACTS.

(On Behalf of Defendant J. W. Dunfee.)

BE IT REMEMBERED: That this cause came
on to be heard in the above-entitled court on Friday,
December 1, 1922, at 10:00 o'clock, A. M., before
Hon. E. S. Farrington, Judge of said court;

Messrs. Cooke, French & Stoddard appearing as
attorneys for plaintiff, C. A. Terwilliger;

Mr. Augustus Tilden appearing as attorney for defendant, J. W. Dunfee; and

Mr. M. A. Diskin appearing as attorney for defendant Orleans Hornsilver Mining Company, a corporation.

Whereupon the following proceedings were had and testimony and evidence introduced:

MR. DISKIN.—On behalf of the Orleans Hornsilver Mining Company, we heretofore filed a motion for further and better particulars; the motion was presented to the Court, and I have been informed that your Honor advised counsel that the matter set [60] forth in paragraph “B” of the motion should be complied with. Your Honor will remember that the complaint in this case charged on information and belief, that the Orleans Hornsilver Mining Company had knowledge of certain alleged acts of fraud that were perpetrated by the defendant Dunfee, and we ask that we be informed as to what information the plaintiff had in that respect; and I have been advised by Mr. Cooke that your Honor had informed him we should be furnished with that information. I gave Mr. Cooke all the time he wanted to give me that information, but I have not been advised up to date who their informant was, or what that information was, and I think we are entitled to that information.

THE COURT.—Was that a decision of the Court?

MR. DISKIN.—I don't think there was any formal decision, but you advised Mr. Cooke that he should give me that information. No formal order was entered, and we haven't been advised of it.

Mr. FRENCH.—We have investigated that matter in connection with the Hornsilver Mining Company, and we have no satisfactory evidence, and at this time we move that the case be dismissed so far as the Hornsilver Mining Company is concerned.

Mr. DISKIN.—No objection.

The COURT.—Does that answer your objection?

Mr. DISKIN.—That is satisfactory.

Mr. TILDEN.—May it please the Court, in consequence of the dismissal as to the corporation defendant, the defendant Dunfee will move for a dismissal, on the ground that the dismissal of the corporation defendant constitutes an election, and that the effect of that election is to destroy any cause of action that the complaint might have stated against the defendant Dunfee.

(Argument on the motion.)

Mr. FRENCH.—I presume, your Honor is not familiar with complaint in this case, and I would like to read it. (Reads [61] complaint.) Now at the time Mr. Cooke drew that complaint, he had information, as stated, that the Hornsilver Mining Company took this property knowing all of the facts; we have since been unable to verify that statement by any proof, and for that reason we asked that the Hornsilver Mining Company be dismissed from the suit, because we will fail to connect it up with knowledge, but that leaves the defendant Dunfee in the same position he has always been.

The COURT.—Well, the motion will be denied

{Testimony of C. A. Terwilliger.)

for the present, and I will consider the whole matter later.

Mr. TILDEN.—I will ask your Honor to reserve the right to renew the motion at some future time.

The COURT.—Certainly; that can be brought up before the decision is rendered. As I understand it, the motion eliminates the Hornsilver Mining Company, and the Orleans Mining and Milling Company is still a party to the suit.

Mr. TILDEN.—One is plaintiff and the other defendant; the defendant company has been dismissed; the defendant company that remains becomes the plaintiff, this being a minority stockholder's suit on behalf of that particular defendant. (Reads answer of defendant Dunfee.)

TESTIMONY OF C. A. TERWILLIGER, FOR PLAINTIFF.

C. A. TERWILLIGER, the plaintiff, called as a witness, after being sworn, testified as follows:

Direct Examination by Mr. STODDARD.

My full name is Calvin Arthur Terwilliger. I am the plaintiff. I reside in California and was residing in that state at the time of the commencement of this action. I know defendant J. W. Dunfee. Have known him since 1907 to this extent, we have lived together in Rawhide, I think it was in 1908 for quite a little while, and we have been together more or less from time to time, I don't remember; we lived in the same house in Rawhide I think in 1908. From the time I met Mr. Dunfee

(Testimony of C. A. Terwilliger.)

up to the 2d day of September, 1916, we were friendly, what I consider intimate friends. I believe [62] the period of time we were occupying the same cabin in Rawhide and cooking, eating and sleeping in the same, was a couple of months.

I had a conversation or conversations with Dunfee relative to the Orleans property in Los Angeles prior to September 2, 1916, as a result of which I entered into a written contract with him relative to the Orleans Mining and Milling Company. (Witness is shown and identifies contract in question, a full copy of which is attached as exhibit to the complaint in this cause.

Mr. TILDEN.—This contract is admitted by the pleadings.

The WITNESS.—(Continuing.) After entering into that contract I made some payments of money to Dunfee under the terms thereof, in all eight thousand dollars (\$8,000.00). I can't say the exact dates of three thousand (\$3,000.00) of it, but I think on the 15th day of February, five thousand (5,000) was paid. The three thousand (3,000) was paid at various times; two thousand (2,000) was paid before I went up, and then the thousand (1,000) after I had seen the property. The two thousand was paid along from the time of the date of the contract up until I would say the first of the year or around there—between September and the following January. Three hundred thousand (300,000) of the shares of the stock of the Orleans Mining and Milling Company were issued to me. I

(Testimony of C. A. Terwilliger.)

sold thirty-three thousand (33,000) shares; I hold two hundred sixty-seven thousand (267,000) shares and have held same since some time right after the payment of five thousand dollars (\$5,000.00) in 1917, the 15th day of February. At all times since about that time I have been and am now the owner of two hundred sixty-seven thousand shares of said stock. The date of incorporation of the Orleans Mining and Milling Company is September 16, 1916. [63]

Mr. TILDEN.—If you will state what you want to bring out by these preliminary matters I will admit them.

Mr. STODDARD.—These preliminary matters I want to bring out at this time are that Dunfee was the president, the general manager and a director of the Orleans Mining and Milling Company at all times from the incorporation of the company, or very shortly thereafter, up to the present time; and that Mr. Terwilliger is also the vice-president and director, and that E. Carter Edwards was the secretary of the company, and also a director.

Mr. TILDEN.—You have the right persons, and I will admit that they were such officers at all times that the company was operating as a corporation; that at all times it functioned, it functioned thru those people, and that no successors have been elected.

The WITNESS.—(Continuing.) Referring to the time of the payment of money aggregating eight

(Testimony of C. A. Terwilliger.)

thousand dollars (\$8,000.00) by me to Mr. Dunfee pursuant to this contract—I had visited the Hornsilver property, that is, the mining property held under lease at Hornsilver once before I made the last payment. I was not there prior to the making of the first payment. I paid about two of the three thousand dollars before I was there—two thousand or twenty-five hundred, I am not sure which, before I was there at all. I was in Brawley, which is in Southern California, 250 miles south of Los Angeles, where payments of most of that money was made in cashier's checks or postoffice money orders.

(There was here admitted in evidence without objection a lease in words and figures following:)

PLAINTIFF'S EXHIBIT No. 2.

[Written across face of instrument:] “Cancelled May 30, 1919, for Non-performance of Monthly Shifts.”

“THIS AGREEMENT OF LEASE, made and entered into this 19th day of June, 1915, by and between LE CHAMP D'OR FRENCH GOLD MINING COMPANY LIMITED, a corporation duly organized and existing under and by virtue of the laws of England, having its principal place of business in the City of London, England, at No. 7, Old Broad Street, E. C., and an Administrative seat in the City of Paris, [64] France, at No. 1, place Boiledieu, party of the first part and hereinafter referred to as the COMPANY; and Mr. J. W.

DUNFEE party of the second part, and hereinafter referred to as the LESSEE:

WITNESSETH, that the COMPANY for and in consideration of the rents, covenants and agreements hereinafter reserved and expressed, to be kept and performed by the said LESSEE, has leased and let, and by these presents does lease and let unto the said LESSEE, the following described premises and property, situate near the town of Hornsilver, County of Esmeralda, State of Nevada, to wit:

All those certain Lode Mining Claims in Hornsilver Mining District, known and designated as Orleans No. 1, Orleans No. 2, Orleans No. 3, Orleans Extension and Orleans Extension No. 1, at and near the town of Hornsilver. AND also the machinery erected thereon together with hoist, tools, rails, etc., and more particularly described in Schedule i hereto annexed.

TO HAVE AND TO HOLD, for the purpose of mining, from the date hereof up to and including the 31^{rst} day of May One Thousand nine hundred and seventeen (1917); said LESSEE in consideration of the premises covenant and agrees with the COMPANY, its assigns and successors, to work immediately after eleven days from date of this agreement, and to work the same continuously in a workmanlike manner, keeping the same securely timbered and to pay royalty to the company, its agent or attorney, as rental for said premises as follows to wit:

ROYALTY, flat rate of TWENTY SIX AND ONE QUARTER per cent (26.25%) on the full value of the ore shipped by the LESSEE, after deducting the sum of TEN dollars (10) per ton for transportation and reduction expenses and also the bullion tax, the said sum of ten dollars being agreed upon by both parties. The said ROYALTY to be retained by purchaser of ore and thereupon immediately paid by said purchaser to the credit of J. P. Charra, power of attorney for the COMPANT, or his successor. [65]

It is further understood and agreed between the parties hereto, that the LESSEE shall give the COMPANY a three day notice of the shipment of any and all ores and that the said LESSEE shall work at least sixty (60) shifts of one man during each and every month continuously during the life time of this lease and all work to apply to assessment work of the COMPANY.

During the term of this lease the COMPANY shall at any time have the right to ascertain the existence, state and condition of the tools, machinery and material, as described in Schedule i, and to call upon the LESSEE to make good to the COMPANY any parts of said tools, machinery and material that might be missing, destroyed or damaged. And the LESSEE, at the expiration of this lease, agrees to make good to the COMPANY all said tools, machinery or material that might have been lost, destroyed or damaged, during the term of said lease.

No assignment of this lease, or right to sublet said premises, or any part thereof, shall be made, without the consent in writing of the COMPANY being first had therefor.

It is further understood and agreed that should the LESSEE fail to work at least sixty (60) shifts of one man during any month, this lease would terminate at the end of the following month, and any ore extracted by the said LESSEE and not removed during the said following month, shall be and remain the property of the COMPANY.

It is hereby mutually understood and agreed, that in case any disagreements or disputes shall arise between the parties hereto as to their respective rights under this lease, or what is due or owing thereunder from the LESSEE to the COMPANY, for royalty or for any other matter that may come up for settlement or adjustment under its terms, that the COMPANY shall in such case or cases, choose one person, the LESSEE a second person, and these two a third person, as arbitrators, and such three persons so chosen [66] shall have the power to arbitrate, hear and decide finally, all such matters or questions that shall or may arise, or come up for settlement under the terms of this lease, and neither party shall have the right to appeal from the award and decision of such arbitrators, the right of appeal being hereby waived.

IN WITNESS WHEREOF, the parties hereto, the COMPANY and the LESSEE, have caused this instrument to be duly executed, signed, sealed and subscribed by their duly authorized representatives,

in the town GOLDFIELD, State of Nevada, this 19th day of June, 1915.

LE CHAMP D'OR FRENCH GOLD MINING COMPANY, LIMITED,

By Its Attorney-in-fact:

J. P. CHARRA.

The Lessee: J. W. DUNFEE.

Signed and sealed in the presence of: Witness:

J. V. DUCEY.

(Endorsement): The foregoing lease is extended as follows: Provided that the Lessee is still working on the 31st day of May, 1916, this Lease is hereby extended up to and including the 31st day of May, 1918.

This Feby. 25, 1916.

LE CHAMP D'OR FRENCH GOLD MINING COMPANY,

Trustee.

By E. CARTER EDWARDS,

Its Attorney-in-fact.

The foregoing Lease is hereby extended further, for another year, to wit: Up to and including the 31st day of May, 1919.

This April 18th, 1917.

LE CHAMP D'OR FRENCH GOLD MINING COMPANY, LIMITED.

By E. CARTER EDWARDS,

Attorney-in-fact.

The foregoing instrument is marked Plaintiff's Exhibit 2.

The COURT.—I understand that Mr. Edwards is the attorney-in-fact for the lessor?

Mr. STODDARD.—Yes, the attorney-in-fact for the lessor. [67]

The COURT.—And the lessor is the French Company?

Mr. STODDARD.—The French Company, the owner of the claims.

The COURT.—What was his office in the other company, was he one of the directors?

Mr. STODDARD.—It has been stipulated that E. Carter Edwards was a director and secretary of the Orleans Mining and Milling Company, the lessee operating under this lease, which is in the name of J. W. Dunfee; and I will ask counsel at this time if it also may be stipulated that Mr. Dunfee assigned that lease to the Orleans Mining and Milling Company?

Mr. TILDEN.—Yes.

Mr. STODDARD.—And it was under that assignment this corporation was operating the mining claims as lessee?

Mr. TILDEN.—That is admitted.

The COURT.—He is a director, then, of the company to whom this lease was assigned, and also the attorney-in-fact who executes the lease on the part of the owner or lessor?

Mr. STODDARD.—Yes, your Honor. And I will also ask that it be stipulated that a power of attorney granting authority to E. Carter Edwards from the French Company appears of record in Esmeralda County, and that the assignments were made under that authority.

(Testimony of C. A. Terwilliger.)

Mr. TILDEN.—Yes. That the assignments were made under that authority? That is what you said.

Mr. STODDARD.—I should have said extensions instead of assignments.

Mr. TILDEN.—Yes.

The WITNESS.—(Continuing.) I am familiar with the signature on that receipt (referring to receipt dated February 15, 1917, exhibited to witness and reading as follows: "Received [68] eight thousand dollars (\$8,000.00) in full payment as per Terwilliger-Dunfee agreement on Orleans Mining and Milling Company property" and purporting to be signed by J. W. Dunfee). Dunfee wrote that and handed that to me.

Mr. TILDEN.—The receipt of the money is admitted. We don't admit that the money was received on that date; it was received in various sums up to that date; I think that is the fact.

The WITNESS.—(Continuing.) The Orleans Mining and Milling Company after its incorporation proceeded with operations for mining and developing and extracting ores from the mining claims held by it under the lease. Those operations were actively in progress in 1917 the greater part of the time. I think that it was in the early part of 1917 that those operations were commenced, I would say around March, 1917, and from that time they were handling ore continually and mining and developing until, speaking from information that I have here to-day, November 8, 1918, when the property was closed down.

(Testimony of C. A. Terwilliger.)

Mr. STODDARD.—(Q.) I will hand you what purports to be a report of the officers and directors of the Orleans Mining and Milling Company, and the stockholders of the Orleans Mining and Milling Company, under date of August 1, 1918, and ask you to state whether or not you were present with any other officers or directors of the company at the time that that statement was prepared?

(A.) Yes, I was present. The statement was prepared in E. Carter Edwards' office in Goldfield, Nevada, about the 1st of August, 1918.

(Statement is offered and admitted in evidence without objection, marked Plaintiff's Exhibit 3, and is as follows:)

PLAINTIFF'S EXHIBIT No. 3.

J. W. DUNFEE, C. A. TERWILLIGER,
President and General Manager. Vice-President.
[69]

ORLEANS M. AND M. COMPANY,
Mines: HORNSILVER, NEVADA.

REPORT OF THE OFFICERS AND DIRECTORS TO THE STOCKHOLDERS OF THE ORLEANS MINING & MILLING COMPANY.

The officers and directors of the Orleans Mining & Milling Company deems it fit and proper to signify to the stockholders of the Company a statement of their intentions and policy in conducting the business of the company during the present war emergency, and state the same as follows:

The management have always had in view the policy of making the mine self-sustaining, and have at all times paid its bills and running expenses, so that the credit of the Company has always been unquestioned. During the present war emergency, we believe this policy is particularly proper, because, as all thinking men know that the expenses of living and cost of material necessary to be used in conducting mining operations have greatly increased all over the country. The fact is also well known that the money that men of capital ordinarily invest in mines is now being almost all invested in some war industry, or in purchasing the Liberty or other bonds of the Government, or in making gifts to the Red Cross work of the Nation. It is easily seen, therefore, that the present is not the time to enlist capital for any other than a Government or war purpose, for we must be patriotic above all other things, and first help the Government to win the war. This is our slogan.

We are thus bound by our imperative duty, in the premises, and therefore, say it is unwise, and our efforts would be ineffectual if we tried to enlist capital at the present time to develop the mining property of the Orleans Mining & Milling Company. We have succeeded at all times in paying the labor and running expenses of the company, and are in good shape to take advantage [70] of any good luck, such as striking a good body of high grade or other pay ore, and in such event making the mine yield a handsome dividend, after paying all running expenses. And if we so

succeed the past good name of the company in honestly and economically conducting its operations on this property will fatten the good luck.

The present prospects of the mine are good, as on the 600 foot level after encountering some rather bad luck on the 400 and 500 foot levels in finding a leached-out condition and ore of so low grade as hardly to bear treatment under present conditions, we have uncovered a fine body of ore running from \$45 to \$50 per ton in the better class of it, with a larger amount ore of \$15 to \$25 per ton.

The owning Company has given its consent in writing directing Mr. E. Carter Edwards to extend the lease for another year, that is to June 1st, 1920, which will be done.

The Company has also kept in mind the development of the property, and the ore mined has been milled at the nearby mill at Hornsilver, and the proceeds used in development work and payment of bills, and the deeper developments have been very encouraging as above stated.

The company has also an option to purchase the *the* property leased from the owning company, which can be exercised at any time we deem it practicable.

J. W. DUNFEE,

President.

C. A. TERWILLIGER,

V. President.

Dated Goldfield, Nevada, August 1st, 1918.

(Seal)

E. CARTER EDWARDS,

Secretary.

(Testimony of C. A. Terwilliger.)

Mr. STODDARD.—(Q.) During the time of the operations of this company, from the time you have stated, about the month of March, 1917, up to the time of its closing which you have stated as being November 8, 1918, will you state who was in charge of the operations of the property? [71]

(Objection, discussion and ruling.)

Mr. TILDEN.—We will admit this, and probably it is all you want, and that is, all of the mining work was superintended and taken care of by Mr. Dunfee, overlooked by Mr. Dunfee; it was laid out by him, and he saw to it that it was performed; he hired the help, and paid it; everything that a man would do to open up a mine it fell to Mr. Dunfee's lot to do.

Mr. STODDARD.—And that would include the reports to stockholders?

Mr. TILDEN.—We will admit those reports as you produce them, they are very few.

Mr. FRENCH.—Do you admit that Mr. Dunfee had full and complete charge of the operations of the company on the grounds?

Mr. TILDEN.—I admit that under the By-Laws and the Articles of Incorporation, and the laws relating to corporations, and the resolutions of the board; if you want me to admit that *he any* authority as Dunfee, a person, to do anything, he did not; he looked precisely for his authority to those things that a corporation officer should and does look.

Mr. STODDARD.—I think that covers the matter.

Mr. TILDEN.—And I will make my qualification a little more; he wasn't doing that work under the contract of September 2, 1916, which we can conveniently call the 50-50 contract, but he was doing it in the capacity I have stated.

The COURT.—Just a minute. I would like to get that further condition which you attached to the stipulation.

Mr. TILDEN.—This case seems to be based on a contract that is set forth in full in the complaint; it is the contract that Mr. Terwilliger says he entered into with Mr. Dunfee in Los Angeles before the organization of his leasing company. Our theory is that after the company was formed, the office of the contract had been performed, that the contract was then [72] *functus officio*, you might say; that it did not govern the parties any more; that thereafter they were *govern*, as they had to be, by the laws relating to corporations; in other words, the obligations that they took on by forming the corporation were superior to the obligations that they took on by the contract, and thereby the obligations of the contract were merged in the obligations imposed by laws relating to corporations. If, for instance, a provision of this contract was contrary to the law governing corporations, it would be void, or would become void by the organization of the company.

The COURT.—I see now.

(Testimony of C. A. Terwilliger.)

Mr. TILDEN.—I will admit that this contract would have had this much effect if it had not been wholly superseded, that it was an understanding between these two parties how they would act as prospective officers of the corporation. Now, if in acting that way they were acting within the spirit of the laws of corporations, their act would be valid; if it was not within that spirit, then their act would be invalid, because contrary to public policy. It is rather fine but I want to keep within the limits of those admissions.

Mr. STODDARD.—(Q.) Mr. Terwilliger, I hand you a letter dated March 26, 1920, attached to an envelope addressed to you, and showing a post-mark dated Goldfield, March 27, 1920, at ten A. M. and purporting to be signed by J. W. Dunfee, and having an endorsement written on the back in lead pencil, and ask you to state whether or not the signature of that letter is in the handwriting of J. W. Dunfee? (A.) Yes, sir.

(Q.) And whether or not you received that letter thru the mail? (A.) Yes, sir. [73]

(The letter and pencil endorsement thereon and envelope are admitted in evidence without objection, marked Plaintiff's Exhibit No. 4, and are as follows:)

PLAINTIFF'S EXHIBIT No. 4.

Geo. R. Hickernell, Proprietor.
 Goldfield Hotel.
 Goldfield, Nev.

March 26 (1920).

Friend Cal.

Rec your letter glad to hear from you.

In regard to Orleans if I can secure a 2 $\frac{1}{2}$ years lease and option from Judge Edwards which I believe I can. Do you think you could take the old Co and get the money by selling stock to work it. We start out on a new Bases I got wise to the stock game

I have looked the state over and there a better chance on the Orleans than any thing I saw War times upset us Wire or write me what you are willing to try and do—or what you think could be done—the inducement are better now than ever before. We eventually get in our own mill

I feel fine now had my tonsols taken out absolutely cured my newritis hope you and Mrs. Terwilliger is well.

Yours Truly
 J. W. DUNFEE.

(Pencil Endorsement:)

Ansd. Mch. 30/20

and stated would not raise any money on the old lines, and would not make any agreement about this matter by letter or wiring. Told him to come to Los Angeles and we would go into the matter in

(Testimony of C. A. Terwilliger.)

detail and come to some understanding for financing Co. C. A. T.

Last letter (X)

19—

(Envelope:) (In Pencil:) Mar. 27, 1920. [74]

(Goldfield)

(Mar. 27)

(10 AM.)

(1920)

(Nevada)

Geo. R. Hickernell, Proprietor,

Goldfield Hotel,

Goldfield, Nev.

C. A. Terwilliger

4419 Finley A

Los Angeles

Calif

(In pencil:) Last Letter

(X) (No. 19)

The WITNESS.—(Continuing.) The pencil memorandum on the back of that letter, Plaintiff's Exhibit No. 4, is in Mrs. Terwilliger's handwriting. The writing in pencil "Last letter" is in my handwriting, and that was referring to the last letter from Mr. Dunfee which I received. Number 19 refers to the envelope it was in, I think. I at one time had a letter to correspond with the envelope, and I think I made it 19 on the envelope, I don't know. As to the date the words "Last letter" were written, I would say it was some time during this year. I have replied to that letter. My reply is

(Testimony of C. A. Terwilliger.)

set forth by the defendant Dunfee in his answer in this case. I received communications and reports from Dunfee during the time that the Orleans Mining and Milling Company was in operation upon the leased property.

(The following letters were identified by the witness as having been written by and by the witness received from defendant Dunfee, admitted in evidence without objection, and marked respectively and in their following order Plaintiff's Exhibits Numbers 5, 6, 7, 8, 9, to wit:)

PLAINTIFF'S EXHIBIT No. 5.

J. W. DUNFEE, C. A. TERWILLIGER,
 President and General Manager. Vice-President.
 ORLEANS M. AND M. COMPANY,
 Mines: Hornsilver, Nevada.

1/4/18.

Mr. C. A. Terwilliger,
 Brawley, Imperial County,
 Calif. [75]

Friend Cal:

At the present writing the Silver Mines Corporation have not as yet taken any of our ore. My last talk with Mr. Brady was that he would be ready shortly after the first of the year to give us our rates and that he would probably arrange to take one ton of our ore to two tons of his. From present indications however, it looks to me as though he is going to finish the Mill dump before taking any of ours. This will take approximately another thirty

days. Mr. Brady will be here sometime during the coming week and then I will be able to get definite information. As soon as I make definite arrangements regarding taking our ore I will let you hear further from me.

Wishing you a prosperous New Year, I am,
Yours Truly,
J. W. DUNFEE.

(Envelope:)

Orleans M. & M. Company, (Stamps 3¢)
J. W. Dunfee, Manager,
Hornsilver, Nevada.

(Pencil:) Jan. 1918.

(Goldfield)

(Jan. 6)

(6 AM.)

(1918)

(Nev.)

Mr. C. A. Terwilliger,
Brawley,
Imperial County,
California.

(Pencil:) No. 25.

PLAINTIFF'S EXHIBIT No. 6.

J. W. DUNFEE, C. A. TERWILLIGER,
President and General Manager. Vice-President.

ORLEANS M. AND M. COMPANY,
Mines: Hornsilver, Nevada.

Aug. 31, 1918.

Friend Cal.

I had delayed writing to give you something definite [76] the latest is the mill will run till

15 of Sept and meby longer. of course I had prepared to close so now I am hurrying my work in my East Drift on the 600 level. it looks like we have ore son to Day I have 1 foot of \$22. ore. Do hope it widen. from winz shoot we shipped in the

20

minth of Aug 174. of ore. Best Run \$25 gold. 2-04 oz silver total 27.22—which is good ore I havent don much with winz of late Now you and I Judge will adopt some sinsible policy to protect every body it has been Hell to handle this on the account of the ware Besid the difficulty with the Silver Mines Co. the Judge and I made a tript to Reno to force the Payment of the \$17.26 the Silver M Co. owes us and got a strong order for them to pay at once so you and your stock holders can rest that you and I do our best to Pull things throug right the mining game is killed till after the war Will write you soon again.

J. W. DUNFEE.

(Envelope:)

Orleans M. & M. Company,

(Stamp 3¢)

J. W. Dunfee, Manager,

Hornsilver, Nevada.

(In pencil: Sept. 1918.)

(Hornsilver)

(Aug.)

(—)

(PM.)

(—)

(. Nev.)

Reply inside 49.

C. A. TERWILLIGER

Hotel Munn 5 Olive St.

Los Angeles

Calif.

X Brawley.

(C)

(On back of envelope:)

(Los Angeles, Cal.)

(Sep. 3)

(12-P. M.)

(1918)

PLAINTIFF'S EXHIBIT No. 7.

J. W. DUNFEE, C. A. TERWILLIGER,

President and General Manager. Vice-President.

ORLEANS M. AND M. COMPANY,

Mines: Hornsilver, Nevada. [77]

May 24, 1918.

Friend Cal:

Just a few lines to say we are still in good ore in drift on the 500 feet level and are sinking shaft that make the shoot over 100 feet long up to date I not got any more money going after them again today the cort gave and order to pay for the ore

before the receiver. have looked every day for the check will make you a full report by next thursday

J. W. DUNFEE.

(Envelope:)

(In pencil: July 1918 44)

E. Carter Edwards, (Stamp 3¢)

Attorney at Law.

P. O. Box 1137.

Goldfield, Nevada.

No. 7.

Mr. C. A. Terwilliger,

Brawley,

California.

(Imperial Valley)

R D A.

PLAINTIFF'S EXHIBIT No. 8.

J. W. DUNFEE, C. A. TERWILLIGER,

President and General Manager. Vice-President.

ORLEANS M. AND M. COMPANY,

Mines: Hornsilver, Nevada.

(In pencil: Written by Edwards.)

C. T.

Mr. C. A. Terwilliger,

Brawley, Cal.

Friend Cal:

I received your wire yesterday in regard to the Orleans M. & M. matter and have turned this business over to Judge Edwards who will attend to same for us. The Silver Mines Corporation holds

our money in a deed of trust and it does not appear on their books as an indebtedness. At present I am shipping from 50 to 75 tons per day but will discontinue shipments at any time upon [78] the advice of Judge Edwards. The first money I received for ore was on the 9th inst. which amount to \$1500.00 to cover the March pay-roll. Previous to this I had advanced all expenses for supplies and labor amounting to \$2142.40 so you can see that I would be the real loser in case we failed to get out money. The ore we are shipping them is ore that I couldn't ship out at a profit and it is absolutely necessary that we let them have it if we expect to realize at all from it. Their superintendent informs me that they are depending on us almost entirely for production as they only have about 800 tons in sight at present that they can mill. This is the reason I am crowding my shipments otherwise they would probably close down. They closed down extending the drift from our shaft to their property the last of March. I want to extend this drift from 50 ft. to 75 ft. further and if we don't strike a body of ore I would be in favor of letting them have a portion of the ground adjoining them. We will have to work in unison with them to keep the Mill going or the Camp will fall flat.

Your representative here, John, I am depending on to keep you fully informed as to operations.

It certainly has been a tough proposition for me to finance this matter alone to tide it over without closing it down while waiting returns from the ore.

However, I managed to do so and the future looks much brighter. You know it takes lots of supplies and the labor runs high in the production of from 50 to 75 tons of ore a day.

If it becomes necessary to keep this mill running I may wire you to let me lease the Silver Mines Corporation some of our very low grade ore that we cannot handle at a profit. You must realize that in case anything should happen that would cause the mill to close down it would be as big a blow to us as to them and would kill our proposition. [79]

Trusting this will give you an insight as to how matters stand, I am

Yours very truly,

J. W. DUNFEE.

(Envelope:)

Orleans M. & M. Company,

(Stamp 3¢)

J. W. Dunfee, Manager,

Hornsilver, Nevada.

(Hornsilver)

(Apr.)

(11)

(PM.)

(1918)

(Nev.)

Mr. C. A. Terwilliger,

Brawley,

Imperial County,

California.

No. 8.

X Apr. 1918.

(C)

PLAINTIFF'S EXHIBIT No. 9.

J. W. DUNFEE, C. A. TERWILLIGER,
President and General Manager. Vice-President.

ORLEANS M. AND M. COMPANY,
Mines: Hornsilver, Nevada.

2/4/18.

Mr. C. A. Terwilliger,
Brawley, Calif.

Friend Cal:

I today made arrangements with the Silver Mines Corporation to start taking our ore on the 8th of this month and they have agreed to take 750 tons per month, their minimum treatment charges being \$6.50 per ton up to \$10.00, from \$10.00 on up there will be an additional charge of ten cents on every dollar.

This rate is \$1.00 per ton higher than I anticipated but it is the best I can do for thirty days. Hope later to get a reduction.

The Hardwick-Reed lease will close down on the 8th of this month and that portion of the ground then falls back to us.

During your visit here last Fall you spoke of [80] returning when we started to take out ore again. In case you are still of the same mind I have enough to do to keep you busy and will be glad to have you with me.

Trusting to hear from you at an early date I am,

Very truly Yours,

J. W. DUNFEE.

(Envelope:)

Orleans M. & M. Company, (Stamp 3¢)

J. W. Dunfee, Manager,

Hornsilver, Nevada.

(In pencil: Feb. 1918.)

(Hornsilver)

(Feb.)

(5)

(PM.)

(—)

(Nev.)

Mr. C. A. Terwilliger,

Brawley,

Imperial County,

Cal.

Mr. STODDARD.—We will offer a letter of date June 5, 1918, and signed by J. W. Dunfee; I will have the witness identify the signature. There is no address to the letter excepting “Dear Sir” (witness identifies signature as that of J. W. Dunfee).

(The letter is marked Plaintiff’s Exhibit No. 10 and is as follows:)

PLAINTIFF'S EXHIBIT No. 10.

J. W. DUNFEE, C. A. TERWILLIGER,
President and General Manager. Vice-President.

ORLEANS M. AND M. COMPANY.

Mines: Hornsilver, Nevada.

June 5, 1918.

Dear Sir:

Well I wired you in regard to letting Brady take a lease on our ground from end of drift on the 200 foot level to their end line to surface Received your replyess have called a Director meeting approve of it I and Judge Edwards deem it best [81] as we are all trying to keep the mill going and working to get a reduction in our ore treatment now you and I are going to get along all O. K you xxx going to a fair deal and your stockholders to I am only trying to do best for boath of us so we can make some money now Judge Edwards think it best that Champ D Or Co not give us extension of lease as we retard (?) the camp with our conduct not letting Brady work his ground on through our shaft we are not using at present I had reserved 1/2 time for ourself I wanted them to extend drift so we could see if we wanted to sink shaft deeper as we have one small shoot going down and we would know whether we wanted to go to the expense of sinking Why you took the stand you did I am at lost for you told me to do what I thought best and I did hope you will come around all O K for Judge is determined to give the lease to him

(Testimony of C. A. Terwilliger.)

if he has to kick us out on the first of June next year.

Shipped 1510 ton of ore in May first half May came to 3800 or close sink shaft now have sank about 50 feet mine looks fair not shipping much as no ore in upper levels Will give you a detail report soon

J. E. DUNFEE.

The WITNESS.—(Continuing.) I was first on this property in Hornsilver about the first of January, 1917. Mr. Dunfee pointed out at that time the mining ground of these claims to me; I believe we walked over the ground. I don't believe we examined the surrounding territory as to whether any claims adjoining had been located, or whether it was open ground or not but I was given to understand it was all located, every bit of it for three thousand feet. I got that information from Mr. Dunfee. Referring to report of stockholders dated August 1, 1918, I was in Goldfield at that time and had a conversation with Mr. Dunfee or Mr. Edwards or both of them relative to the property and its [82] condition, or what the prospects and future policy of the company would be. We had a conversation the first afternoon we went in to Mr. Edwards; that was, I think, August 1, 1918, or July 31, one of the two days. There were present Mrs. Terwilliger, Mr. Edwards and myself.

(Q.) And what, if anything, was said?

Mr. TILDEN.—Is this offered for the purpose

(Testimony of C. A. Terwilliger.)

of showing any agreement not embodied in that August 1st letter?

Mr. STODDARD.—No, but for the purpose of showing the representations of Mr. Dunfee and Mr. Edwards to the plaintiff in this action, and his confidence in those statements upon which he relied subsequently.

Mr. TILDEN.—We object to any conversation between this witness and Mr. Edwards. There is no relation of any kind shown to exist between Edwards and Dunfee by which Dunfee would be bound by what Edwards said, and Edwards is not a party to this suit, at least he is not appearing as a party.

Mr. FRENCH.—He is one of the defendants.

Mr. TILDEN.—Well, he is not here defending.

Mr. STODDARD.—Mr. Edwards is one of the defendant directors of the company.

The COURT.—I will allow the testimony to go in, but it will go subject to the objection.

The WITNESS.—(Continuing.) Mr. Dunfee was not present at this conversation. Mrs. Terwilliger, Mr. Edwards and myself were present in Mr. Edwards' office in Goldfield; we discussed the condition at the mine, and Mr. Edwards' idea and opinion of conditions on the proposition, and his and mine were identical. He said that under the present conditions it was evident it was impossible for us to do anything in regard to making any profit for the company, and that he believed that Bill (defendant Dunfee) thoroughly intended to

(Testimony of C. A. Terwilliger.)

close down as soon as he finished a [83] little work which he had started which he thought would open up some good ore. Then we discussed the amount of work that had been done in excess of the amount of work that was called for in that lease, and he said that it would apply on the future extensions, and that he had a letter from the French Company instructing him to extend the lease for another year, that is, to June 1, 1920, which would be done. Then he said that he would make a report out for the stockholders, and he started I think that day to make the report out, and submitted it to Mrs. Terwilliger and myself the next morning, and he read the report to us, and after reading the report to us he said to me, "How does that sound to you?" and I says, "That sounds all right, I think." He says, "If it is not strong enough, I can make it stronger." He at that time made reference to excess of shifts.

I think it was the day after this conference with Mr. Edwards that Mrs. Terwilliger and myself met Mr. Dunfee at the hotel, and we talked to him along the line of property, and he reported the conditions, and he said that he was intending to close down in a very short time, that is, that he had a piece of work that he wanted to complete, and then he was going to close down.

I had about that time a further conversation with Mr. Dunfee. This was at Hornsilver and Mrs. Terwilliger was present. It was about a day

(Testimony of C. A. Terwilliger.)

after we met at the hotel. Mr. Edwards and Mrs. Terwilliger and myself went down there from Goldfield in my car. Mr. Dunfee, Mrs. Terwilliger and I walked over the property and discussed it, and in the line of discussion Mr. Dunfee said, "Now, Cal, you leave it to me and everything will be all right, I will make us all some money."

I think that was the last conversation I had with Mr. Dunfee relative to this lease. I remained at Hornsilver a very short time, all told a couple of hours, and then Mrs. Terwilliger and I left for Big Pine. [84]

(Q.) At the time that you left what were your feelings in relation to Mr. Dunfee as to friendliness or confidence, or otherwise?

(A.) I felt just the same towards him as I had always felt towards him in years gone by when we had no business dealings or anything of the kind, perfectly friendly to him.

(Q.) Did you question or discredit in any way the statements that he made to you?

(A.) Not a bit.

The WITNESS.—(Continuing.) I can give the approximate number of shifts put in by the Orleans Mining and Milling Company during their operations from about March, 1917, to about the 8th day of November, 1918, only by judging the amount of men that were working at times when I went there. I imagine at different times I went there, there were from six to ten men working; that is, they were working different shifts. I

(Testimony of C. A. Terwilliger.)

think I was there three or four times after the formation of the corporation and the company was operating. I think the company worked and operated and mined that property continuously from early in 1917 until they finally closed down in November, 1918. I can't just recall now any time that they closed down. I never received any letters, telegrams, or communications of any kind from Dunfee after the time I received the letter dated March 26, 1920. I have never been in communication with him at any time subsequent to my letter to him of May 2, 1920. It first came to my knowledge *what* he had secured a lease upon the same property in his own name, about the middle of July, 1921. I received this information from a man by the name of John Duffey, who lives in Los Angeles at the Colonial Hotel. I got this information in Los Angeles. I immediately looked Mr. D'Arcy number up, and told him that I was a half-owner in that Orleans property.

(Last sentence stricken by consent.) [85]

(Q.) State any other action or steps that you took after being aware of the lease being taken in the name of Mr. Dunfee, and state what was done?

(A.) I went to Tonopah and employed Mr. Atkinson to look into the matter, and he took up the case, and he made a trip or two to Goldfield, and he didn't do anything, so I afterwards arranged with other counsel; it was several months before he notified me that he could not go on with the case, and then I secured the services of Messrs.

(Testimony of C. A. Terwilliger.)

Cooke, French & Stoddard. I think that was in March of this year.

Cross-examination by Mr. TILDEN.

The WITNESS.—The last time I saw Mr. Dunfee was in Hornsilver. As to where he was living, I understood he was in Divide and Hornsilver and Goldfield. I understood that from different people, and I believe that I have one letter from him that he was in Divide, that he was operating in Divide; I had a letter from him, I think, that gave me that notice when he was in Divide.

(Q.) Where is it?

(A.) I don't know whether we have it or not.

(Q.) A letter from Dunfee to Terwilliger advising Terwilliger that Dunfee was working in Divide.

Mr. STODDARD.—I haven't seen such a letter, if we have it I will produce it.

Mr. TILDEN.—(Q.) Do you recall the date of it?

(A.) No, I don't know the date, it was in 1919 tho, I think, that is, if my memory serves me I think it was in 1919. It was before the March 26, 1920 letter—

The WITNESS.—(Continuing.) At my last meeting with Dunfee at Hornsilver, when he said in effect that he was about to close down, he did not say how soon he expected to close down. [86] He said as soon as there was a piece of work he had started, as I understood it, as soon as he had

(Testimony of C. A. Terwilliger.)

completed that work which he expected would develop something good, that he expected to close down. I don't think that I protested against that at all, I don't think that I made any protest whatever. He did not tell me how long he was going to remain closed down, and I did not ask him.

(Q.) As far as you knew at that time, the close-down was to be indefinite, was it not?

(A.) My understanding was that it would be closed down until we made arrangements, he and Mr. Edwards and myself, to finance the property.

(Q.) To finance the property?

(A.) Yes, to get together.

(Q.) What arrangements did you and Mr. Edwards and he ever make to finance the property after that?

(A.) We never got together to finance the property after that.

(Q.) Now you say at this same meeting in Hornsilver he said to you in effect, you just leave this to me and I will make you all some money; is that right?

(A.) Everything will be all right, he said we will make some money out of it.

(Q.) Didn't he say, just leave this to me; isn't that what you told the Court?

(A.) That is the substance of about what I testified to.

(Q.) Tell the Court how he was going to make some money for you all if he was closing down

(A.) I never discussed that in detail at all.

(Testimony of C. A. Terwilliger.)

(Q.) You don't believe that there was any prospect of his making any money for you, do you?

[87]

(A.) I never believed anything he ever told me.

(Q.) You never did? (A.) No.

(Q.) You haven't reason to state at this time that he ever told you anything untrue, have you?

(A.) What I am testifying to here has been the way I have always been with him.

(Q.) Well, answer my question: I want to know whether you can testify about anything at this time where Mr. Dunfee was anything but perfectly frank and honest with you, specify it if you can.

(A.) That he was anything but that?

(Q.) Yes.

(A.) Well, I would hardly know how to testify that way; I will have to have some instructions from the Court if I will attempt to testify, and how to testify; I can tell of course things that I have not been asked on the stand, I would have to refer to.

(Q.) I have asked you to specify any circumstance wherein Mr. Dunfee was anything but fair and open and candid with you.

The COURT.—That is a very broad question. You can give anything in response to that, that illustrates his unfairness to you, whether it is connected with this case or not, as I understand it.

Mr. TILDEN.—Anything.

(A.) I considered that I should have notification—

(Testimony of C. A. Terwilliger.)

(Q.) Never mind what you considered, I am asking you for a fact.

(A.) He didn't notify me when property I was interested in, when the lease was canceled, I wasn't notified when the lease was canceled, and I had always been told he could always get [88] extensions, and that I would always be protected, and that I was fifty-fifty with him in all of his futures in this property; that is the way I bought into the property; and he got \$3,000 for my fifty per cent of its futures, and he took all that.

(Q.) You have put all that in your complaint, haven't you? (A.) Yes, sir.

(Q.) Now, just specify anything, any one particular conversation, or any one act of Mr. Dunfee's which you can tell the Court you think was unfair to you, or lacking in candor.

(A.) All right, I will refer you to a telegram Mr. Dunfee sent me, and he says you or your stockholders, I can't remember it exactly, but I will produce it in evidence.

(Q.) Please produce it; before you tell anything about it please produce it.

(Witness leaves the stand to get the telegram.)

(Q.) You have the telegram, have you?

(A.) Yes, sir.

(Q.) What is the date of it?

(A.) This is Goldfield, Nevada, May 31, 1918, C. A. Terwilliger, Brawley, California. You or your stockholders can get no extensions of lease or

(Testimony of C. A. Terwilliger.)

option; don't come up to talk with me, I am through with you.

(Q.) Well, is there anything lacking in candor about that, Mr. Terwilliger; if there is, tell us what it is?

(A.) Well, his attitude towards me after I had fulfilled my contract with him.

The WITNESS.—(Continuing.) Whatever ill feeling was implied by that telegram was removed at that time we were in Goldfield, and he established confidence again with me; that is, he made an apology for the sending of that telegram, and such as that. [89]

(Q.) Now, Mr. Terwilliger, let us go back to where we started: You said you met Mr. Dunfee in Hornsilver, and he told you he was going to shut the mine down, and he then said, "Leave everything to me, I will make money for you all"; tell the Court how he was going to make money for you all if he was going to shut the lease down?

(A.) He never mentioned any of his preparations, or anything further than that after the war was over that he and Judge and myself would get together and arrange some plan to finance the property.

(Q.) Then you knew when he said this to you, to wit, "Leave it all to me, I will make some money for you," that there was nothing in view whereby he was to make any money for you, did you not?

(A.) I thought we would get together, and that we would finance the property again; we had

(Testimony of C. A. Terwilliger.)

plenty of stock, lots of stock never had been disposed of, the treasury had never been sold, to sell the stock and put a price on the property of \$250,000, and turn the money into the company.

(Q.) From that time to this what did you ever do together, yourself and Mr. Dunfee and Mr. Edwards together, to discuss the financing of the lease?

(A.) I wrote to Mr. Dunfee to Divide, a letter of—

(Q.) Have you a copy of that letter to Divide?

(A.) Yes, sir.

(Q.) Let us have it.

Mr. FRENCH.—Here it is.

Mr. TILDEN.—What is the date of it?

Mr. FRENCH.—January 19, 1920.

Mr. TILDEN.—(Q.) Is this the letter that you refer to? (Hands to witness.) (A.) Yes, sir.

Mr. TILDEN.—May I read this, Gentlemen?
[90]

Mr. STODDARD.—Certainly.

Mr. TILDEN.—(Reading:) “Brawley, California, January 19, 1920. J. W. Dunfee, Divide, Nevada. Friend Will: Have leased all my land in Imperial Valley, and we are moving back to our home in Hollywood about the first of February. Now I would like to hear from you regarding the Orleans property, and what your opinion is about its future. Not having seen you in Los Angeles during last summer as I expected, or hearing from you, I of course don't know how matters stand. I

(Testimony of C. A. Terwilliger.)

expect now to have time to do something, and when I see the stockholders they will want to know what the outcome of their investment is going to be, as everyone of them have figured that they would make some money up there. Please let me hear from you as soon as possible. Direct the letter to Brawley and it will be forwarded if we have left here. With best wishes for the New Year, I am, Yours very truly, C. A. Terwilliger."

(Q.) Assuming that this lease ran until May 31, 1920, that was, well, four months and a half before the expiration of the lease, was it not?

(A.) I wasn't assuming anything in regard to the lease at all, my understanding was entirely different; when I bought into this property I bought into it on a fifty-fifty basis.

(Q.) I am talking about what you knew about the terms of the lease; you knew the lease had been extended?

(A.) My information was that it would run until June 1, 1920.

(Q.) So that this letter that I have just read was written four months before the expiration of the lease, if that was the expiration point?

(A.) Yes.

(Q.) Well, you knew at that time that Mr. Dunfee was in Divide, did you?

(A.) That is where I heard he was. [91]

(Q.) Did you know how long he was in Divide?

(A.) No, sir, not the exact length of time. I had one letter from him, I believe, when he was in Di-

(Testimony of C. A. Terwilliger.)

vide, saying he was president of certain companies there in Divide.

(Q.) Did he answer this letter of January 19, 1920?

(A.) No, that letter was returned to me I believe unopened.

(Q.) Returned to you unopened. Well, you told the Court that this letter was one of the means that you took to bring yourself and Mr. Dunfee and Mr. Edwards together; when you answered that way did you know that this letter had not reached Mr. Dunfee's hands? (A.) Beg pardon?

(The reporter reads the question.)

(A.) Well, I must have known it, because it was returned to me. I don't think it was opened at all. I think the letter was returned to me marked on it "Not delivered for want of definite address," or something, I don't remember just what it was.

(Q.) Did you ever send it out again?

(A.) No, not that letter.

(Q.) Tell the Court what other means you took after that last meeting in Hornsilver to bring yourself, Mr. Edwards and Mr. Dunfee together to finance the lease?

(A.) I wrote letters from Imperial Valley; I think there is a letter there among the letters, where I said it was our duty to get together and we ought to get together and try to do something to finance the property, and I wished that he and Mr. Edwards and myself would get together and

(Testimony of C. A. Terwilliger.)

do that. Now that letter must be there among the letters, if you will give us time—

(Q.) I would like to have you try to find it, if you will. [92]

(A short recess is taken at this time.)

(Q.) Did you find that letter, Mr. Terwilliger?

(A.) I haven't found that one letter, but here is a letter.

(Q.) What is the date of it?

(A.) Brawley, California, February 18, 1919. May I sit down and read this letter?

(Q.) Mr. Terwilliger, we are confining your testimony to a time after that meeting in Hornsilver.

(A.) A time after?

(Q.) Yes, after August 1, 1918. What is that date again?

(A.) This is all right. Brawley, California, February 18, 1919.

(Q.) All right.

(A.) (Reading:) "Brawley, California, February 18, 1919. Hornsilver, Nevada. J. W. Dunfee, Hornsilver, Nevada. Dear Sir: Your letter received, and it has taken me some time to go over the matter you mention with the stockholders. First I want to put you right regarding any misunderstanding with the stockholders here. The situation was explained to them thoroughly before they invested. They came to me entirely unsolicited on my part with the proposition for me to raise \$8,000, five thousand dollars of which was to be expended on the property, and three thousand dollars

(Testimony of C. A. Terwilliger.)

was to be paid to you personally for your own use, and also you were to receive one-half interest in the capital stock of the new company. I raised this \$8,000 for your proposition, and carried out my agreement with you in its entirety, and your continually harping on my interest not costing me a cent is ridiculously inconsistent and a false statement, so if you continue to be dissatisfied with your own proposition it is entirely your own fault and cannot be charged to [93] anyone else. To quote again from your letter, nothing you would like better than to meet all your stockholders and explain this to them. Now we have talked this matter over, and as you make frequent trips to Los Angeles it is only a little further to come on down to Brawley, and a good road all the way by the way of San Diego. We are all of the same opinion that the most satisfactory way to have a thorough understanding and to go over the whole situation, would be for you to come down here, then we could see what plans for the future could be mapped out, as your report shows that the property had deteriorated materially as far as the outlook for ore production is concerned, since the company began its operations, and we naturally supposed that arrangements could now be made for the purchase of the property at a much lower figure than heretofore. If you come down here we may be able to work out some intelligent method for financing the property. In conclusion I will say that if you come down here we will get together for the sole purpose of raising money for

(Testimony of C. A. Terwilliger.)

the purchasing of the property, as it is your and my duty to see this thing through, and make it a success if possible. I am willing and anxious to confer with you and get action to that end. Yours truly,
(Signed) C. A. Terwilliger.”

Mr. FRENCH.—Here is another one.

Mr. TILDEN.—Before you get to the next, why didn't you call attention to the fact that you had an arrangement with him in Hornsilver, that he and Edwards and yourself should get together to discuss the further financing of the property?

(A.) Why didn't I call his attention to it? I can't exactly tell you why I didn't call his attention to it at that time, but being away from him I didn't think we could do anything when we were apart, and that the proper thing to do was for all of us to get together and figure on some plan whereby we could do something for the benefit of everybody concerned. [94]

(Q.) How is it that you failed to mention in that letter that Carter Edwards was to be a party to these future negotiations?

(A.) Mr. Dunfee was president and general manager and treasurer of the company, and he was the man I had always known, the man that I had all the faith in, and the man that was instrumental in me putting this money in there, and he is the man of course that I directed all of my correspondence to.

(Q.) I am questioning you with reference to what you said was said at Hornsilver.

(Testimony of C. A. Terwilliger.)

(A.) Beg pardon?

(The reporter reads the question.)

(A.) If you will just ask me that question again so I can get it, and I will answer.

(Q.) You told the Court that at Hornsilver Mr. Dunfee said you leave all this to me and I will make you some money, and that you understood by that, that you and Mr. Edwards and he would get together at some indefinite time in the future and discuss how this money was to be raised; now I am asking you why you didn't mention that in this letter you have just read; why did you make no reference to Edwards? (A.) To Mr. Edwards?

(Q.) Yes.

(A.) Mr. Dunfee was president and general manager, and I thought if he said to Mr. Edwards, now I have a letter from Cal and when we were to go down there and get together on this proposition, I naturally supposed Mr. Edwards would come on with him. I might have addressed the letter in the same language to Mr. Edwards.

(Q.) Well, did you?

(A.) I addressed it to Mr. Dunfee for the simple reason Mr. Dunfee was the man I had done the business with in the beginning, and I naturally addressed the letter to him. [95]

(Q.) Did you ever write any letters to Mr. Edwards to that effect, the effect of the letter you have just read?

(A.) I don't know just the exact language, but I referred in one letter to Mr. Edwards that I didn't

(Testimony of C. A. Terwilliger.)

know whether he was aware of the fact of the existing contract of mine, that existed with Mr. Dunfee; I referred to it in that respect, or something to that effect.

(Q.) I will ask you to get that letter presently; in the meantime you can get the letter which you say you have in addition to the one that you last read to Mr. Dunfee.

(A.) You want me to get the letter that I mentioned Mr. Edwards in?

(Q.) No, you say there is another letter there to Mr. Dunfee along the lines of the one that you last read.

(The witness leaves the stand to get the letter.)

(A.) Here is a letter to Brawley, California, April 9, 1919. Mr. J. W. Dunfee, Hornsilver, Nevada. Dear Sir: Not having received any reply to my letter of several weeks ago relative to financing the property, I am writing again to ask you what you are doing for the interests of the company, and I want you to meet me in Los Angeles as soon as you can arrange to be there, so that definite plans may be made for continuing operation. Please let me know promptly what your plans are as I must know. Very truly yours, signed, C. A. Terwilliger.

(Q.) What is the date of that?

(A.) That is Brawley, California, April 9, 1919.

(Q.) Did you get an answer to that?

(A.) Yes, here is a letter dated April 12th, and it must be an answer to this.

(Q.) Is that a letter from Mr. Dunfee to you?

(Testimony of C. A. Terwilliger.)

(A.) Yes, sir. [96]

Mr. STODDARD.—That is a copy; we don't seem to have the original.

Mr. TILDEN.—What is the date of it?

(A.) April 12, 1919. Do you want me to read the letter-head and all?

(Q.) No just give the place and the date.

(A.) (Reading:) "Goldfield, Nevada, April 12, 1919. C. A. Terwilliger, Brawley, California. As you gave me my orders what to do in regard to the Orleans, I closed and paid up bills, then when your threatening letter came, I proceeded to have an expert accountant go over things at more cost to me. I have worked this property for the company conscientiously so that it has broke my health over worrying. Our lease has been closed now six months, and I will accept your conversation with Mrs. Dunfee as your true feeling towards me. It will be impossible for me to meet you in Los Angeles as I am interested in three companies in Divide District which is on the curb in New York, that keeps me here till some time this summer. I have nothing but friendly feeling for you, and be glad to talk to you on business matters. Yours truly, J. W. Dunfee."

(Q.) What is the date again?

(A.) That is April 12, 1919.

Mr. STODDARD.—You are going to put in the others in connection with that, are you?

Mr. TILDEN.—They can go in, they have all been read into the record.

(Testimony of C. A. Terwilliger.)

(Q.) Did you ever attempt to meet Mr. Dunfee after that letter that you have just read?

(A.) After this letter?

(Q.) Yes.

(A.) The letter that I wrote in 1920, and wanted him to come to Los Angeles, I wrote first and he answered my letter, come to Los Angeles and we would get together.

(A.) Answer my question.

(A.) That is after; that is after that letter, yes,
[97]

(Q.) Did you ever try to meet him after writing the letter you have just read?

(A.) Is the date of that 1919? Yes, sir.

(Q.) How did you try?

(A.) I wrote him a letter to come to Los Angeles; I wrote him first and asked him about the property, and then in answer to that he wrote me a letter, and asked me what I thought could be done.

(Q.) What effort did you make to meet him?

(A.) I wrote him to come down there.

(Q.) Besides writing him to come down there, what effort did you make to meet him?

(A.) I thought financing the property would be done down there, and our meeting—

(Q.) Answer the question.

(A.) That is the effort I made to meet him, when I wrote him that letter and told him to meet there in Los Angeles; and also that letter of mine I think that I wrote to him in Divide was after that letter, I think, that one that was returned to me.

(Testimony of C. A. Terwilliger.)

(Q.) When he wrote you that he could not go to Los Angeles, why didn't you try to go to Nevada?

(A.) At that time?

(Q.) Any time.

(A.) I didn't get any letter from him after I wrote him to come down there.

(Q.) You just read a letter in which he said that he could not go to Los Angeles.

(A.) That was at that time, I was in the same position at that time that he was; I had business which kept me down there at that time, in the Valley.

(Q.) Did that business that you had keep you there continually until July, 1921? [98]

(A.) No. Until July, 1920, you mean?

(Q.) No, 1921, the time you say you discovered these facts.

(A.) No, but between that time I wrote him two letters, I think it is, and wanted him to come and meet down in Los Angeles, because in Southern California was where I figured on raising the money to finance the property; we had 400,000 shares of stock in the treasury, none of it sold; I had sold my own stock and turned every bit of that money in.

(Q.) You knew the lease could not run without money, didn't you?

(A.) I had no direct concern in the lease, I—

(Q.) Answer the question: You knew the lease could not run without money, didn't you?

(A.) I suppose.

(Testimony of C. A. Terwilliger.)

(Q.) You knew that if you and Dunfee and Edwards didn't get together and arrange for money, that the lease would not run, didn't you?

(A.) Yes.

(Q.) What did you expect would happen to the lease, that it would be continued indefinitely without any work being done on it?

(A.) No, sir; I figured I had put my money in there, and that I had assurances from E. Carter Edwards, his final remark to me was, you go back to Imperial Valley and tell your stockholders not to worry, that their investment will be protected in every way; that was in 1918, about August 3d or 4th, when we were leaving Hornsilver; that was my assurance from E. Carter Edwards, secretary of the company, and I naturally had faith in Mr. Dunfee and him, and supposed they were two of them, and I was alone, that they would come where the money was forthcoming when they wanted the money; they were there together before, and everything was fine, and I was treated with the utmost respect; after I put the [99] money in, after I made the protest, after I had put \$8,000 in and I raised a protest I was insulted.

(Q.) Never mind; you have answered the question. To get back to the question I asked, how did you expect the lease to run without money?

(A.) I didn't; and I expected to help finance that property, if they would come where the finances were; I considered it a waste of time to go to Gold-

(Testimony of C. A. Terwilliger.)

field to raise money, because I didn't consider it was there.

(Q.) Did you expect the lease to be indefinitely extended without any work?

(A.) I didn't expect it to be indefinitely extended without any work, but I will tell you what I did expect.

(Q.) All right.

(A.) I expected whenever that property was in the name of J. W. Dunfee, that me and my stockholders stood fifty-fifty with J. W. Dunfee, that was my direct understanding in this proposition, and the only understanding I ever had, and I never sold a share of stock to the stockholders without citing them to the fact that I was fifty-fifty with J. W. Dunfee; that was my statement to them in detail, and that I would never be thrown out.

(Q.) Now listen to this question: You stated you knew the lease could not run without money, and you stated that you knew the lease could not run indefinitely without work, when did you expect that lease to cease?

(A.) I expected, as I told you, to help to finance that property.

(Q.) When did you expect the lease to cease?

(A.) I expected at all times if Mr. Dunfee had anything to do with that property to be protected.

[100]

(Q.) Is not this the situation, Mr. Terwilliger, that you were simply holding Mr. Dunfee to any property that he might ever get on that Orleans

(Testimony of C. A. Terwilliger.)

ground, whether it was under this lease we have been discussing or any other instrument; that is your position, isn't it?

(A.) My understanding with—

(Q.) Never mind; what was your position?

(A.) I am going to tell you my position with Mr. Dunfee, if the Court will allow. My position with Mr. Dunfee was, and my understanding with him, that as soon as he ever got a lease or purchased an option or anything on that property, I was fifty-fifty with him; that is why he took three thousand dollars, and used five thousand dollars for the development; I bought my interest in the property, in the futures, and he took three thousand dollars, and it is referred to in a letter where they wanted him to kick me out, as they were sore because he had given me one-half.

The WITNESS.—(Continuing.) I read the complaint in this action before swearing to it. I think that I was satisfied before swearing to it that it stated my complaint against Dunfee. I am forty-eight years old and have been in business more or less all my life. The complaint to the best of my understanding sets forth what I claim as against Mr. Dunfee.

(Witness' attention is called to the following allegation in the complaint:)

“Also, that he, the said Dunfee, was on very close and intimate terms with said French Company, and particularly with the said E. Carter Edwards, who was the agent and attor-

(Testimony of C. A. Terwilliger.)

ney-in-fact for said French Company, and that because thereof, he, the said Dunfee, could and would obtain any renewal or extension of said lease, also option to purchase said mining claims, that [101] might be desired by plaintiff, the defendant Dunfee, or the corporation to be formed.”

The WITNESS.—(Continuing.) I never at any time told Mr. Dunfee or ever expressed the desire to have the first lease extended after the lease shut down. I never had dictated to him about the lease.

(Q.) I am not asking whether you dictated; you have used the word “desired” here; you say that he was to get an extension that was desired; now the lease shut down in November, 1918?

(A.) Yes, sir.

(Q.) Tell the Court when after that you expressed a desire to have the lease extended.

(A.) I can't say that I ever conferred with him.

(Q.) Can you say that you never did express that desire?

(A.) I never made a demand on him about getting extensions at all.

(Q.) Now you say also that the extension was to be procured if the corporation desires; can you tell the Court at any time after that lease shut down that the corporation expressed a desire for an extension of it?

(A.) Never in writing, or I don't think verbally we ever did.

(Q.) Take that paper again and I will read a

(Testimony of C. A. Terwilliger.)

little further down. (Reads:) "and wholly trusted and depended upon the said Dunfee, and believed and relied on his statements that he alone could obtain such extension or renewals and that he would obtain same for the use and benefit of said corporation whenever deemed desirable or necessary:" You add the word "necessary," do you know of the corporation ever taking any action in which [102] it declared it necessary that that lease be extended? (A.) No.

(Q.) Now I call your attention again to the first part of that language, that you wholly, that is the plaintiff, yourself, "wholly trusted and depended upon the said defendant, Dunfee, and believed and relied on his statements that he alone could obtain such extensions or renewals." Did you follow me as I read that? (A.) Yes, sir.

(Q.) Didn't you obtain at least two extensions?

(A.) Personally?

(Q.) Yes.

(A.) Never; never made application for them, never; never made application for them.

(Q.) In this lease which is in evidence, I call your attention to the second endorsement, reading, "The foregoing lease is hereby extended further, for another year, to wit, up to and including the 31st day of May, 1919. This April 18th, 1917." French Company by Edwards attorney in fact. Didn't you obtain that extension yourself?

(A.) Never; never saw that piece of paper that I know of before.

(Testimony of C. A. Terwilliger.)

(Q.) Where were you in April, 1917?

(A.) I may possibly have been in Nevada in 1917; I don't know, I can't swear to that, where I was, without I would look up something that would substantiate my testimony, and I can't say right now where I was at that time. April, 1917?

(A.) April, 1917.

(A.) I don't think I was in Nevada, I don't know; I think I was there in February; you say I was there February 15, 1917, and I would not be sure; I am quite sure I wasn't in Nevada in April. [103]

(Q.) There were three extensions, weren't there?

(A.) I don't know the number of extensions. As I say, I had never given that extension proposition any attention, because I relied solely on Mr. Dunfee.

(Q.) Mr. Terwilliger, I asked you if there were not three extensions.

(A.) I can't tell you about the number of extensions.

(Q.) If there were not three extensions how do you claim that the lease continued until May 31, 1920?

(A.) I suppose that there was the lease that we began on in 1916, which ran to a certain point, and then that there were two extensions from that time on, that is what I thought.

(Q.) Now, Mr. Terwilliger, I just read you this second extension, and I will read it again: "The foregoing lease is hereby extended further for an-

(Testimony of C. A. Terwilliger.)

other year, to wit, up to and including the 31st day of May, 1919." Now if another extension in addition to that was not procured, how do you claim that the lease extended to 1920?

(A.) I never mentioned this—as I gave evidence this morning, Mr. Edwards advanced that information, and I never made mention of it; he says, I have also received instructions from the French Company, that is, not instructions, something to that effect, granting an extension of the lease until June 1st, 1920; that was in his language. I don't see it still; have you got that lease, or anything of the kind? I never insisted for that lease at any time, I was assured at the time that I went into this proposition that that was not my business, I wasn't questioned about getting that myself; I have a letter there where Mr. Dunfee refers to it and says I could have the lease as long as I wanted it, as I told; it is in a letter.

(Q.) What did you and Mrs. Terwilliger go to Goldfield [104] for in August, 1918?

(A.) Eighteen? We went up there on business.

(Q.) What business? I don't ask your private business, but was it business in relation to this lease?

(A.) We went up there to see the property, and see Mr. Dunfee and see Mr. Edwards.

(Q.) Anything else?

(A.) That was about the extent of our business up there.

(Testimony of C. A. Terwilliger.)

(Q.) You went into his office, I suppose, in Goldfield?

(A.) Mr. Edwards' office in Goldfield first.

(Q.) And he started in by informing you that the French Company had authorized him to extend the lease, did he?

(A.) No, sir. He started in—we discussed the property, the condition of it at the mine, and everything of the kind in general, that was our first discussion; that was our first discussion.

(Q.) How did this question of the extension come up?

(A.) He mentioned that after we had talked a little bit, and he said under present war conditions, high prices, and such as that, that it was impossible to make any money running the property at this time, and he said that he was satisfied that Bill intended to close down as soon as he had done some work which he had started; we were talking then, and he says, the excess work we have done, excess shifts, will apply on future extensions.

(Q.) How did he come to mention this question of extensions?

(A.) I don't know at all.

(Q.) Didn't you bring it up with him at all?

(A.) No, sir, I did not.

(Q.) He just volunteered the information?

[105]

(A.) Mr. Edwards was at that time running for district attorney, and he was very affable and very talkative and very fine, and he talked right off the

(Testimony of C. A. Terwilliger.)

reel, I didn't draw him out at all; I don't know as I mentioned, I could not swear on the stand that I ever mentioned and said to him, now did you do so and so, did you get this lease, did you get this extended; I never made any mention of that thing, or anything of the kind; this question was gone into in details, and he talked freely and I talked freely.

(Q.) You thought it important enough to put it in that August 1st report, didn't you?

(A.) In the report which was read here?

(Q.) Yes.

(A.) Thought it was important enough? Mr. Edwards was secretary of the company, I was not; he put that in there, I didn't dictate that report.

(Q.) You signed it, didn't you?

(A.) I signed it, but I didn't dictate it, not one word of it.

(Q.) Didn't you get it up together?

(A.) No, sir. Mr. Edwards says I will make out a report for you to take down to the stockholders; he started in that evening, I believe, to make this report out; the next morning we went into his office and he handed me this report, and stood there, and I read the report over, or he read the report to us, that is the way it was; and he said, "How does that sound to you?" I says, "It sounds good to me," and he says, "If it is not strong enough I can make it stronger."

(Q.) Did you read it yourself at any time?

(Testimony of C. A. Terwilliger.)

(A.) I read it afterward, I am not positive, I don't know how soon after or anything of the kind.

(Q.) Did you read it yourself before you signed it?

(A.) He read it to me, I believe; I might have read [106] it myself before signing it.

The WITNESS.—(Continuing.) Mr. Edwards also volunteered that the past work could be credited on the future work. We have done a great deal of work in excess. I regard that as an important matter and certainly must have so regarded it at that meeting, because I said it sounded all right to me. He read that report to me, and I said it sounded all right to me.

(Q.) Will you kindly take that report and see where there is anything about crediting past work on future requirements?

(A.) I don't believe that was in the report.

(Q.) Why did you not call Mr. Edwards' attention to the fact that it was not in the report?

(A.) Because I was not the dictator of any part of that report; if I had been it would have been different.

The WITNESS.—(Continuing.) I do not recall ever having read a certain ten page letter from Mr. Edwards to Mr. Cooke in which he went into all of the facts of this case as he understood them.

The WITNESS.—(Continuing.) I had no knowledge that would lead me to know whether or not Mr. Dunfee had resumed work on the Orleans lease after October 10, the day of shutting down.

(Testimony of C. A. Terwilliger.)

From that date to the date of the expiration of the lease, assuming that the lease was extended to May, 1920, was twenty months.

(Q.) You don't know what was happening in that twenty months?

(A.) Some correspondence is referred to, and I think some read, where I tried to get together.

The WITNESS.—(Continuing.) I had never financed this property at Hornsilver or Goldfield. I used to come when I thought it necessary to look after the affairs of the company. One time when I thought it necessary I came to Hornsilver and Goldfield, [107] then to Reno on the receivership matter; Mr. Dunfee was very busy and asked me to go up there with Mr. Edwards.

(Q.) Didn't you think it necessary at any time during that twenty months of supposed idleness to come and find out whether anything was going on in that line?

(A.) Well, I was going to say that I never—

(Q.) Did you or did you not?

(A.) I am going to answer you this way,—I will have to answer you this way; I didn't think it was possible for me to do anything in this proposition line; now I will tell you why I must have a reason for thinking I could not do anything alone; now I was to have been president and general manager of this company the second year, Mr. Dunfee came down to Los Angeles the second year, and we had a conference in the Alexander Hotel, and I told

(Testimony of C. A. Terwilliger.)

Mr. Dunfee, I said, Mr. Dunfee, I said, Bill,—I says to Mr. Dunfee—

(Q.) From October 10th, 1918, to May 31, 1920, why didn't you go to Hornsilver and find out if the lease was in operation?

(A.) Because I wasn't president and general manager of the company, and my contract was with the president and general manager of the company, that is why I didn't do it, had I been president and general manager you can rest assured I would have been there.

(Q.) You hadn't any reason to suppose that any work was going on, had you?

(A.) I didn't have any reason to think it was, I—

(Q.) You knew the treasury was empty, didn't you?

(A.) Yes, I believe he told me when we were up there, there was about nine hundred dollars in the treasury, when we were there in 1918. [108]

(Q.) You knew the property wasn't self-sustaining, didn't you? (A.) Yes, sir.

(Q.) And you knew that the lease would expire by its own terms, assuming that it was extended on August 1, 1918, would expire by its own terms on May 31, 1920; that is right, isn't it? (A.) Yes.

(Q.) And you never went near it?

(A.) But I knew also that I was protected, and my stockholders were protected, because the thorough understanding if Mr. Dunfee had in fact gotten that property in his own name we would

(Testimony of C. A. Terwilliger.)

have been loser, I understood all that, my stockholders understood that, my stockholders all understood that as soon as Mr. Dunfee ever acquired that property I was selling them an interest in, that I had fifty-fifty—

(Q.) Let me ask you another question: You told Mr. Dunfee to shut down, didn't you?

(A.) He had told me three or four months before that he intended to close down, then at the final—possibly, I know I wrote to him, and told him that my advice to him would be to close down the property immediately, because we were not realizing a dollar on it, and I thought the property could be financed much easier with lots of ore in sight than it would be to work the property out, you understand, and not have anything in sight.

(Q.) So your idea was that he should close down in order that there should be a lot of ore in sight?

(A.) If we were going on to finance it with the 400,000 shares not sold.

(Q.) And he then told you he was about to exhaust the little ore that was in sight?

(A.) Beg pardon? [109]

(Q.) Well, let that go. You read that letter set forth in the answer,—did you read that letter, or did you hear me read it this morning?

(A.) I don't remember the letter you have referred to.

Mr. STODDARD.—You might mention the date.

Mr. TILDEN.—It is September 30, 1918.

(Q.) I show you a letter purporting to bear

(Testimony of C. A. Terwilliger.)

your signature; it is dated September 30, 1918, and this is the letter set out in the answer; is that your signature?

(A.) Yes, sir. that is my signature there.

Mr. TILDEN.—We offer this letter, may it please the Court.

Mr. FRENCH.—No objection.

(The letter is admitted in evidence, marked Defendant's Exhibit "A," and is as set forth in the answer.)

Mr. TILDEN.—(Q.) In this letter you say: "Now would say in regard to the mine, it is my opinion and all of the stockholders here"; those are the other men that you represented in this case, aren't they? (A.) Yes, sir.

(Q.) (Reading:) "That under the present war conditions we are only sacrificing every bit of the ore we are taking out of the mine in keeping it running, and we are not in favor of you putting up your money in running the property and placing the company under obligations and being indebted to you." Did you ever withdraw this letter? Did you ever tell Mr. Dunfee I have changed my mind about what I told you on September 30, 1918, and I think you had better start in to work?

(A.) I don't believe I ever did. Did you read that letter in its entirety, did you read all of it?

(Q.) No; do you want me to read it? [110]

(A.) That is all right.

(Q.) Now you say here also: (Reads:) "And also in view of the fact that we have done a very

(Testimony of C. A. Terwilliger.)

large amount of work more than our lease calls for, we are certainly entitled to close this property down until the end of the war, when we can do something with a fair chance of getting some returns for our investment—besides the experience.” Why didn’t you state in this letter that Carter Edwards had told you the old work could be credited on the future work?

(A.) I didn’t think it was necessary for me when Mr. Edwards and Mr. Dunfee were so close together, connected as they were, and had been for years, it was necessary for me to submit something to Mr. Dunfee to be considered by him or Mr. Edwards; I knew that I stood between them, that is, that I was simple a come-between in the way I figured it; Mr. Dunfee and Mr. Edwards were there, and they were on the property.

(Q.) You put into this letter every reason you could think of for shutting down, didn’t you?

(A.) I don’t know, there might have been possibly some other reasons I didn’t put in there.

(Q.) If you had thought at that time Mr. Edwards had told you past work would be credited on the future, you would have put it in there, wouldn’t you? (A.) One reason—

Q.) Wouldn’t you have put it in the letter?

(A.) I could not say that I would; you have asked me the reason why I didn’t put it in, I was going to give it; I had assurance on this proposition as to where I stood, I had assurance of exactly how I stood with Mr. Dunfee on this property.

(Testimony of C. A. Terwilliger.)

(Q.) I will read this also: "Whether the mill closes down or not, it is my advice representing fifty per cent of the stock, that we close down without further delay or sacrificing any [111] more ore or money." Did you ever withdraw that advice? (A.) I don't know that I ever did.

The WITNESS.—(Continuing.) I recall the report of November 6, 1918, rendered just after closing down.

(The report referred to is identified by the witness, admitted in evidence without objection, marked Defendant's Exhibit "B," and is as follows:)

DEFENDANT'S EXHIBIT "B."

C. A. TERWILLIGER,

Vice-President.

J. W. DUNFEE,

President and General Manager.

ORLEANS M. AND M. COMPANY.

Mines: Hornsilver, Nevada.

November 6th, 1918.

To the Stockholders, and C. A. Terwilliger, Vice-President of the Orleans Mining and Milling Company:

Gentlemen:

Inclosed find financial statement of past year's business of Orleans M. & M. Co. The conditions have been so unfavorable owing to the war, high prices, and inefficiency of labor, that it has been deemed best to close down the mine. The mine is entirely free from debt, and no trouble can come from creditors, as there are none.

As to the future of the mine, will make the following recommendations: Extend the drift on 600 ft. level to the East. On drift on this level we have been in a big body of low grade quartz for the last 150 feet, with a small rich seam laying in the quartz. At time of closing down mine, have not encountered pay ore shoot in the drift to the East as we had expected from the rake of the shoot from the upper levels. Indications are good for the shoot still to come in. To the west drifted 65 ft. on the 600 level. From a winze at this point I took the last shipments and found some very rich ore at bottom of winze. Owing to high cost of mining, etc., could not underhand-stope this ore out at a profit.

Would recommend sinking shaft to 700 ft. level to [112] get in under the body of ore. From my experience gained in development of the mine, I consider this the most encouraging point for development work. The upper levels to the 600 have been pretty well mined out, and the dump ores as well as all ore that could be mined at a profit at this time, have been shipped to the Silver Mines Corporation for treatment at its mill.

On the Orleans No. 3 claim, Old Shaft, the Silver Mines Corporation under permission from us, drifted from a point 250 feet west of shaft on the 200 ft. level about 340 feet northwesterly to the side line of No. 3 claim. The first 40 feet of this work followed the vein, and a cross-cut was made through about 8 feet of quartz that assayed about \$5.00. The balance of the distance to the side line, the foot wall

(Testimony of C. A. Terwilliger.)

side of the vein was followed, and the vein was not cross-cut, and no further ore was found, which no doubt would have been the result had the vein instead of the foot wall been drifted on. This work to the side line, develops this ground at this point and shows the vein tendency is to be large and permanent, with large bodies of low grade quartz. This Old Shaft was originally sunk a depth of 300 feet and a drift extended from it 126 feet to the west, but it was filled up to the 200 foot level by the French Western Company, a former owner, and the drift to the west was never driven far enough to reach these bodies of quartz downward.

For future development, I also recommend that this shaft be cleaned out and this drift on the 300 foot level be extended from its present extension to touch the large bodies of quartz extending downward from the 200 foot level.

The visible ore in the mine except as above indicated has been pretty well worked out in the different levels, and the success of the mine in the future will require proper [113] development to disclose the ore bodies that diligence and perseverance will discover no doubt.

Respectfully submitted,

J. W. DUNFEE,

President and General Manager.

The WITNESS.—(Continuing.) As to the fairness of that report, I was advised by Dunfee, president and general manager, that we had a better chance there than any other place he had seen, and

(Testimony of C. A. Terwilliger.)

he had traveled all over Nevada, and there was every reason in the world for me to believe that it was possible for us to finance the property and purchase it. He told me that in March, 1920.

(Q.) I am talking about November 6, 1918; if there is anything unfair about that report tell the Court about it now.

(A.) I would say that I wasn't on the property; Mr. Dunfee was the man down the mine, he was the man that reported to me, and I always took his reports as they were written; I paid \$2,000.00 on the property before I saw it, so if I had had no confidence in Mr. Dunfee that establishes the fact with me that I believed absolutely in what he told me, I was willing to give him \$2,000.00 or \$2,500.00 on his word.

(Q.) Did the conditions set forth in that report, as far as you know, change during the next twenty months?

(A.) Only from knowledge I had of him saying it was the best he had seen; that is all I know anything about conditions changing.

(Q.) The physical conditions didn't change as far as you know, they were just the same twenty months afterwards as they were on November 6, 1918?

(A.) I suppose so.

The WITNESS.—(Continuing.) [114] Referring to the financial statement mentioned in the November 6th report, and the statement therein to the effect that the company was \$200.00 in debt, I don't just recall that period. The last financial

(Testimony of C. A. Terwilliger.)

report that I had in mind was that there was about nine hundred dollars in the treasury, something like that; that was the only financial statement that I have in mind now, this other may have been later, that is, I may not have given it my close attention and hadn't it committed to memory. I don't think that I got the report showing nine hundred dollars. I think that Mr. Dunfee told when I was there in 1918 they had nine hundred dollars. That was pretty nearly three months before the lease shut down; when Mr. Dunfee said they had nine hundred dollars in the treasury I don't know whether they had money coming from Mr. Brady or not. (Witness is shown what purports to be the financial report mentioned in the report of November 6th, 1918.) It shows the company was in debt \$200.00, that the company had 400,000 shares of treasury stock, and the last share of treasury stock I sold I sold at 50¢ a share, and no attempt had ever been made to make disposition or give me an opportunity to associate myself with anyone to use a share of that treasury in financing this company. I think that Dunfee had a salary of \$150.00 a month as manager. I think his expenses were paid on his car. As to whether there was money in the treasury after November 6th to pay his salary, I imagine that there was no money in the treasury, but there was four hundred thousand shares of treasury stock and I was ready at any time to do my part and help dispose of them, and place it in the treasury.

(Testimony of C. A. Terwilliger.)

(Q.) Now take the complaint, Mr. Terwilliger, and turn to page 8. (A.) All right.

(Q.) At the bottom of Paragraph 8: (Reads:) "And in truth and in fact the mine showing continued to improve so [115] that in March, 1920"—notice that is about eighteen months after you closed down—"the prospect for a large and paying mine was much more favorable than previously, all of which was well known to and understood by said defendant Dunfee." Is that a fact?

(A.) That was the intelligence that he gave me on the property when he conferred with me by letter, that it was the best property that he had seen, and the chances were better there than any place; he had been all over the state, and that the chances were better on the Orleans property than any place he had been; that was the intelligence I received, my last communication through letter from Mr. Dunfee was that it was the best property in his opinion that he had seen; I based every bit of my confidence in this property on Mr. Dunfee's judgment at all times; my personal judgment on this property was never instrumental in my financing this property at all, it was Mr. Dunfee's.

(Q.) Was it a fact that the mine's showing continued to improve, so that in March, 1920, the prospect for a large and paying mine was much more favorable than previously?

(A.) We had done a great deal of development work there, the Orleans Mining and Milling Company had.

(Testimony of C. A. Terwilliger.)

(Q.) Answer the question; is it a fact?

(A.) I can only answer that by the intelligence he gave me in 1918, that it was the best property.

(Q.) He didn't write you the mine was improving?

(A.) He wrote me the chances were better there than any other place he had been.

(Q.) Did he tell you the mine was improving? Haven't you told the Court you knew the mine was idle for twenty months? (A.) Beg pardon?

(Q.) Haven't you told the Court you knew the mine was idle for twenty months?

(A.) Idle for twenty months? [116]

(Q.) Up to the time of the expiration of the lease? (A.) Yes, I think I made that statement.

(Q.) Well, is it a fact that the mine's showing continued to improve so that in March, 1920, the prospect for a large and paying mine was much more favorable than previously?

(A.) Well, I base my—

(Q.) Well, is it a fact?

(A.) It must be a fact; Mr. Dunfee advised me that the chances were better there than any place he had been, and I based my opinion on Mr. Dunfee's judgment of the property, and if I had raised any more money it would have been entirely on Mr. Dunfee's judgment of the property. That was the intelligence I received from Mr. Dunfee, that it was the best property he had seen, and he had looked over all of it, and that the chances were better there for a paying mine than any place that he had been.

(Testimony of C. A. Terwilliger.)

The WITNESS.—(Continuing.) I have a letter from Mr. Dunfee dated January 31, 1918.

(The letter is admitted in evidence without objection and marked Defendant's Exhibit "C" and the same, together with the envelope, is as follows:)

DEFENDANT'S EXHIBIT "C."

"Goldfield, Nevada, January 31st, 1919.

Mr. C. A. Terwilliger,
Brawley, California.

Dear Sir:—

Will say all you have to do is to look at your reports I sent you, and you will find out just what the Orleans M. & M. Co. Received for ores shipped, and also money expended. I have all checks and returns for the ore in the office here, which it would be a pleasure for me to show the stockholders.

As to standing between me and the stockholders, you don't have to, as it was your own personal stock you sold them. You set the price and gave them 32,000 shares for \$8000.00 to fulfill [117] your contract with me, and kept 268,000 shares for yourself which did not cost you a cent. Nothing would I like better than to meet all of your stockholders and explain this to them. What you are driving at in your letter is a mystery to me. You were always going to do great things for the Orleans M. & M. Co., but I realized on account of the war that nothing could be done.

The mill closed down, and have taken up a part of their pipe line, and it is hard to raise money for

(Testimony of C. A. Terwilliger.)

Hornsilver, as she has a black eye, and we were merely operating under a lease as you were aware of.

If you have any suggestions to make let me hear from you, as you always represented that you could finance it. That was your part of the agreement. Further you ordered the mine closed in an indignant way, so it is up to you to start it, and my report covers the true conditions of the mine.

Yours very truly,

J. W. DUNFEE."

(Envelope:)

Orleans M. & M. Company,

(Stamp 3¢)

J. W. Dunfee, Manager.

Hornsilver, Nevada.

(Goldfield)

(Feb. 1)

(6 AM.)

(1918)

(Nev.)

Mr. C. A. Terwilliger,

Brawley,

California.

(Imperial Valley)

(In pencil: Ansd. 2/18)

The WITNESS.—(Continuing.) I have the letter of September 14, 1918, referred to in Defendant's Exhibit "C."

(Witness produces letter, identifies same and the same marked Exhibit "D" is admitted in evidence without objection and is as follows:)

DEFENDANT'S EXHIBIT "D."

J. W. DUNFEE,

President and General Manager.

C. A. TERWILLIGER,

Vice-President. [118]

ORLEANS M. AND M. COMPANY.

Mines: Hornsilver, Nevada.

Sept 14 1918

Friend Cal

Received your letter today Will say in regard to your letter at the time Mr. Brady was to treat our ore for 5.00 per ton and also miners wages was \$4.00 ware conditions changed every thing miners get 5.00 and 5.50 milling charg went to \$6.50 and there never been any profits made up to date made. It true we have had a few hundred on hands at times but the way Brady paid us never had a full months pay roll ahead You was here and remember it well Now I am pulling up again and will close dow if mill shuts down the 20 of this month and if there any money left if you say so we allow him his money on the account of his circumstances only if it can be legaly allowed the mining is killed in this state on the account of the war We try pull things through. I drifting east on vein in hope of getting a shiping ore shoot thing looks good for a shiping shoot condition about the same as it was on the 350 level before we got that rich shoot that you sampled the first time you sampled the mine if we close down you and I will try outline a plan of action

Yours Truly

J. W. DUNFEE."

(Testimony of C. A. Terwilliger.)

The WITNESS—(Continuing.) I claim that for eight thousand dollars (\$8,000.00) I paid to Mr. Dunfee I have a fifty per cent interest in anything that he might acquire in the indefinite future on the Orleans property; that is my idea. After the organization of the corporation the promotion stock was divided between him and me. I got 300,000 shares. I disposed of some 32,000 of my share in Imperial Valley, by which I received this \$8,000.00 and paid it over to Mr. Dunfee. Mr. Dunfee paid \$5,000.00 of that [119] into the treasury for corporate purposes, used it for the development of the mine. Of the balance of three thousand I myself drew a \$1,000.00 for organization, trips and all my expenses combined. I got it later on, I don't know what it came out of; it could not have come out of the three, because he wasn't paying me out of the three that he was to take; that specifically set out that Mr. Dunfee was to receive three thousand dollars in cash, and I was to receive no part of that at all. I received the money after we were going, at intervals, and it was allowed and approved by Mr. Dunfee, and I received my expenses and things of that kind, for organization and such as that, but not any understanding of mine that I ever received a dollar out of the three thousand; that was definitely understood by me that Mr. Dunfee got that money, that that was his money. I am just estimating the amount around a thousand dollars. That was for different trips and expenses, and things of that kind, incurred by me coming up.

(Testimony of C. A. Terwilliger.)

When I came up there for the company I was allowed for, I think I was allowed on this trip I came up to Reno with Mr. Edwards, a certain amount of money. I took the trip to Reno because Mr. Dunfee was at the mine and busy, and I was there at the time, and he says, "You can make that trip up to Reno just as well as I can with Judge (Edwards). I am busy and can't go, and I wish you would go up there with him." I came to see Mr. Brady, who owed us money that Mr. Dunfee was trying to collect. Mr. Edwards came up with me. He was secretary of the company. I have nothing to do with the managing of the company, and I don't know whether he was the attorney for the company or not; Mr. Dunfee knows that. As to the necessity of my accompanying Mr. Edwards, it was simply a mutual agreement, and Mr. Dunfee's suggestion. I don't exactly remember, but it seems to me that I was at Hornsilver during that time possibly a week or two weeks; it might have been three weeks. I made this trip, one trip that I [120] speak of, in the interests of the company. I was around there with Mr. Dunfee; I wasn't on the payroll; I wasn't drawing any salary. I was drawing expenses while I was there assaying, paying my board, and I presume my expenses came out of that, and I considered the interest of myself, the stockholders of the company; I made the trip to Reno in the interest of Mr. Dunfee and the company in general. I think I went down the mine with Mr. Dunfee while there that time, I am not sure. I

(Testimony of C. A. Terwilliger.)

suppose I have been in the mine maybe three or four times, not often, because I wasn't the manager of the mine, and I based most all of my judgment entirely on the property thru Mr. Dunfee's opinion; he had had the property for years, and I went down and looked it over when he wanted to show me things; I was down in the mine I think it was three or four times. I know something about practical mining. I know how to catch up ground, and protect the mine, and do general mining, and raising and stoping and sinking, and almost everything there is about mining, running a hoist and those things. I myself mined for a number of years.

The following letter was identified by the witness as having been written and signed by him and forwarded to the addressees therein named, admitted in evidence and marked Defendant's Exhibit "E," to wit:

DEFENDANT'S EXHIBIT "E."

"Santa Ana-Aug-30-1917.

Mr. Carter Edwards and Dunfee.

Dear Sir:

I am in receipt of a letter from Dunfee which I infer you know the contents. It is not the listing of the stock that I am in such a hurry about, but the permit to sell stock which we get through Sacramento. I will enclose here a cancellation of any and all indebtedness of mine against the company and when I go to Brawley where the agreement is I will send in the original agreement [121] can-

(Testimony of C. A. Terwilliger.)

celled. Now I am waiting here to get this permit and it has nothing to do with the listing of the stock, that is a different matter and will come later. The principal thing right now is to be able to sell stock, so we can keep money in the treasury, as our funds will soon be exhausted. Will you please telephone Will and have him come up and get these papers for getting the permit to me as soon as possible. I assure you both I am of the same opinion in regard to being fair with the public, and want the company clear and free from debt before any stock is sold. Now it will be clear of all indebtedness upon receipt of this letter as far as I am concerned, so it up to Will to do likewise. Now please attend to this at once, so I can go on with the work. With kindest regards to you both,

Yours truly,

C. A. TERWILLIGER.

(Q.) What was your anxiety to sell stock if you considered that the payment of eight thousand dollars (\$8,000.00) absolved you from any further obligation from the company?

(A.) I didn't consider that, that I had no obligation whatever; I was interested in this property; I was fifty-fifty with Mr. Dunfee, and naturally I wanted to help to finance it, and that was my idea for getting the permit to sell the stock and finance the property.

(Q.) Did you contemplate selling treasury stock?

(A.) That is what I figured on at that time.

(Q.) You recall that this contract of yours pro-

(Testimony of C. A. Terwilliger.)

vides that any future stock sales shall be made from your holdings and Mr. Dunfee's holdings, don't you?

(A.) That never was discussed after we started in, that is in anywise that I remember; it is in the contract.

(Q.) The provision is as follows: "It is further agreed that should it be deemed advisable after the full eight thousand dollars is raised to raise more money for development, [122] the stock so sold shall be taken share for share from the holdings of J. W. Dunfee and C. A. Terwilliger respectively." You abandoned that idea, did you?

(A.) At that time that never entered my mind.

(Q.) Did you abandon that idea?

(A.) That idea never entered my mind when I wrote that letter.

(Q.) You never had any idea then of selling your own promotion stock?

(A.) At that time when I wrote that letter, no.

(Q.) You have been telling the Court about the 400,000 shares that were in the treasury, by which the company could be carried along; your idea that that 400,000 shares could carry the company had to do with your abandonment of this provision that I have just read to you, had it?

(A.) No, sir; I didn't look at it that way at all.

(Q.) Were you operating under the theory that you would dispose of the treasury stock, or under the theory that you would act under this contract?

(A.) I was not manager of the property, and Mr. Dunfee had never submitted to me that he and I

(Testimony of C. A. Terwilliger.)

would sell that stock as it was agreed upon in the contract.

The WITNESS.—(Continuing.) I sold 200 shares of the treasury stock to John Winkler. I did not turn that money into the treasury. That money was allowed me on my expenses. Mr. Dunfee knew about it, and it applied on my expenses, and it was approved. I do not know whether that was included in that thousand dollars or not. Mr. Dunfee said that was all right; he knew about it when I sold this stock to Mr. Winkler. I do not know whether or not that was within the thousand dollars, [123] or in excess of the thousand dollars. I think that was while I was in Hornsilver in April, 1918. It was on the book that Mr. Edwards issued the stock. I don't know whether or not I at that time knew how much the company was indebted to Mr. Dunfee. I don't know whether I had any written knowledge. I think he mentioned that in a letter; I didn't keep the books. I believe that I have a letter from him to the effect that he was advancing money. It might have been discussed between us; he may have mentioned it and talked it over to me, but I don't just recall but I think it is written in a letter. I never told him I would oppose the return of that money to him.

(Q.) During that trip in Hornsilver did you have a conversation with Mr. Dunfee with reference to his giving you some of his stock?

(A.) Mr. Dunfee and I talked, were talking over something about the property one time, and when-

(Testimony of C. A. Terwilliger.)

ever we talked over the property, about the arranging of the different plan to raise money, or anything of that kind, I always said that I figured I had already paid for what I had gotten in the company in my contract so far, and that any arrangement we made that I would have to have some consideration, that was it.

(Q.) What kind of consideration?

(A.) Well, I don't just exactly know what it was; I don't know just what the consideration was.

(Q.) You didn't discuss it?

(A.) I could not say as to what it was.

(Q.) You don't know whether it was to be money or something else? (A.) I—

(Q.) Didn't you—

Mr. FRENCH.—Let the witness finish his answer.

[124]

Mr. TILDEN.—Yes, he ought to be willing to answer.

Mr. FRENCH.—Finish your answer, if you haven't.

(A.) *Mr.* answer?

Mr. TILDEN.—(Q.) Mr. Terwilliger, you told Mr. Dunfee you would not attempt to further finance this company unless he would come through with the hundred thousand shares of his stock, didn't you? (A.) Never; never.

(Q.) How many shares?

(A.) Never; never was mentioned.

(Q.) Well, what was this consideration?

(Testimony of C. A. Terwilliger.)

(A.) I don't know as we ever in our lives discussed any consideration to any point.

(Q.) Tell the Court what the consideration could have been except money or his stock.

(A.) There was never a definite thing about consideration at any time.

(Q.) Well, tell the Court how you used that word consideration?

(A.) In talking with Mr. Dunfee, you mean?

(Q.) Yes.

(A.) I can't tell the Court anything further than I have, that there was no consideration; there was nothing definite, there was never anything of that kind, that is when we did talk it over; one time I got up and left Mr. Dunfee because Mr. Dunfee became angry with me, and I walked down the gulch about two hundred feet, and finally he came on down, and sat down and gave me an awful good talking to, that I remember.

(Q.) Tell the Court about that.

(A.) He said that I was trying to "gyp" or something of that kind.

The COURT.—Said what? [125]

(A.) He said I was trying to gyp him.

Mr. TILDEN.—(Q.) Why did he say that? What does "gyp" mean?

(A.) Well, it is a slang phrase for trying to get the best of him, or something.

(Q.) Tell the Court what happened at that time.

(A.) At that time we were talking back and forth there, there had never been any consideration arrived at, or anything of the kind.

(Testimony of C. A. Terwilliger.)

(Q.) Don't you know why Mr. Dunfee accused you of trying to gyp him?

(A.) No, sir; we were talking business pure and simple, and it was nothing else.

(Q.) What business?

(A.) We were exchanging ideas, that is all, we were not coming to any definite understanding, or anything of that kind; we were simply in a conversational way talking over the properties; that is exactly the way we were talking.

(Q.) Didn't you tell him at that time you would oppose his drawing that \$2,100 unless he paid you some stock? (A.) No, sir.

(Q.) And didn't you tell him also you would oppose the payment of that \$2,100 unless he would go to Mr. Edwards and try to get a further extension of the lease? (A.) No, sir.

(Q.) And wasn't that the reason for his writing you this short telegram: "You or your stockholders can get no extension of lease or option; don't come up to talk to me, am through with you"?

(A.) No, sir.

(Q.) That is not the reason? (A.) No, sir.
[126]

(Q.) And you can't give any other reason for that telegram, can you?

(A.) I have already given you two telegrams yesterday; that telegram was May 30th, wasn't it? Pardon me, what date is that telegram?

(Q.) May 31st, 1918.

(Testimony of C. A. Terwilliger.)

(A.) That telegram was in answer to other telegrams that are in evidence.

Mr. TILDEN.—We offer that in evidence.

(The telegram is admitted in evidence, marked Defendant's Exhibit "F," and reads as follows:)

DEFENDANT'S EXHIBIT "F."

"WESTERN UNION TELEGRAM.

Received at 150 GS U 23.

Goldfield Nev 444 PM May 31st 1918

C. E. Terwilliger

Brawley Calif

You or your stockholders can get no extention of lease or option don't come up to talk to me am through with you.

DUNFEE."

Mr. TILDEN.—(Q.) Now notwithstanding that telegram that I have just read to you, Defendant's Exhibit "F," you and Mr. Dunfee got together again and became perfectly friendly, didn't you, within a month after that?

(A.) Within an hour after that, within less time possibly.

(Q.) No, I mean after that telegram.

(A.) Oh, I beg your pardon. I thought you meant after this other. Yes, sir, after that telegram, that was explained to me, Mr. Dunfee explained the whole thing, and apologized for the telegram, and everything of the kind, and it was perfectly satisfactory.

(Q.) When did he apologize for that telegram?

(Testimony of C. A. Terwilliger.)

(A.) Well, sir, I think it was when we were in Goldfield, 1918, around August 1st or 2d, Mr. Dunfee said he had had an awful time with his tonsils, that he had had neuritis and was almost crazy, and he had had his tonsils removed and—

(Q.) Well, the explanation was perfectly satisfactory?

(Q.) Yes, sir, it was perfectly satisfactory, and I had no feeling towards him whatever.

The WITNESS.—(Continuing.) I remember receiving a letter in which Mr. Dunfee made reference to what Mrs. Dunfee had told him that I had said to her.

(Letter identified by the witness, admitted in evidence without objection, together with memorandum at top of same, all marked Defendant's Exhibit "G," and is as follows:)

DEFENDANT'S EXHIBIT "G."

(Note: Dunfee was in L. A. in July and purposely did not let C. T. Know it or see him.)

J. W. DUNFEE,
President.

J. C. CANNAN,
Secretary.

HASBROUCH DIVIDE MINING COMPANY.

Mines in the Divide District.

Goldfield, Nevada, April 12, 1919.

C. A. Terwilliger
Brawley Calif

As you gave me my orders what to do in regard to Orleans I closed and paid up bills then when

(Testimony of C. A. Terwilliger.)

your threatening letters came I proceeded to have and expert accountant to go over thing at more cost to me. I had worked this prospect so concensus that it had broke my health over worrying our lease has been closed now six months and I'll *excet* your conversation with Mrs. Dunfee as your true feeling toward me. it be impossible for me to meet you in La. Angeles as I am interested in three Co. in Divide District which is on the curb in New York that keeps me here till some time this summer I have nothing but friendly feeling for you and be glad to talk to you on business matters. [128]

Yours Truly

J. W. DUNFEE.

(Envelope:)

Hasbrouck Divide Mining Company, (Stamp 3¢)
Goldfield, Nevada.

(Goldfield)

(Apr 13)

(6 AM.)

(1919)

(Nevada)

C. A. Terwilliger,

Brawley,

Calif.

The WITNESS.—(Continuing.) I have known Mrs. Dunfee since about 1907. I live within five or six or maybe eight blocks of her in Los Angeles. I never found that out until this morning, that is, where she is living this time. I have been at various times

(Testimony of C. A. Terwilliger.)

in communication with her over the telephone since I think 1918. I have lived in Los Angeles since about 1911 or 1912, I think. I have known for a number of years that Mrs. Dunfee was in Los Angeles; I can't give you the exact date, but I knew she made her home there, and she was there most of the time, and I have phoned her, she or her mother, at various times, when they were living on the north side. That has been when I was trying to locate Mr. Dunfee at various times, ask if he was down, or knew when he would be down. I would say that was in 1919 and 1920. My reason to suppose Mrs. Dunfee would be able to inform me was, I thought she knew when Mr. Dunfee came down, and I heard that he was in Los Angeles about in 1919 and 1920, and he never saw me; he knew where I lived, knew my address, and I naturally expected to see him and wanted to see him. The fact is that I knew Mr. and Mrs. Dunfee was in communication, and my opinion was that when Mr. Dunfee came to Los Angeles he called on Mrs. Dunfee. Referring to the letter last admitted in evidence, I think I have had some conversation with her at the time she referred to, that I might have said something while I was in an angry way. I don't know what [129] I said. I did not say anything to the effect that if Mr. Dunfee came to Los Angeles I would have him put in the pen or to the effect that if he came to Los Angeles I would have his automobile seized. I never said anything like that to her at all. The contract that I set up in the complaint was drafted

(Testimony of C. A. Terwilliger.)

by Mr. Dunfee and myself. Mrs. Terwilliger put it into writing at Mr. Dunfee's suggestion and mine, just us three together. Mr. Dunfee said he didn't want to be represented by a lawyer at that time. I suggested taking it to a lawyer and he said that he didn't want to go to a lawyer. I said I had an attorney that had done business for me fifteen years or so, and I said, "We will go over there and he will fix up a contract"; and Mr. Dunfee says, "No, we can fix it up among ourselves," and I think Mrs. Dunfee knew Mrs. Terwilliger had a great deal of experience as a stenographer and such as that. I said, "Well, Mrs. Terwilliger can use the typewriter," and she went out and took this contract you have reference to and came back with it made, and I don't think there was a change made in it by Mr. Dunfee or myself. The last two communications between me and Mr. Dunfee were March 26, 1920, by Mr. Dunfee and May 2, 1920, by myself. At the time I wrote the May 2d letter I knew the lease would expire in some thirty days, unless it had been renewed or something; I knew that was the time it would run. I had the notice of that.

Mr. TILDEN.—(Q.) From the date of expiration of that lease until you discovered the facts of this lease, or the facts on which you base your complaint, was another thirteen months, wasn't it?

(A.) I just didn't get that.

(Q.) I will have it read. (The reporter reads the question.)

(Testimony of C. A. Terwilliger.)

(A.) Yes, sir, it was I think in the light of 1921.
[130]

(Q.) What interest were you taking in the Orleans property in that thirteen months?

(A.) Well, I had never received any communication from Mr. Dunfee.

(Q.) What interest were you taking in the property?

(A.) Well, I was just—I can't say I was taking any interest, that is, in the way of operating, or active in any way.

(Q.) What interest were you taking in the property?

(A.) Well, I wasn't doing anything; I don't think I wrote any more letters, or sent any more letters during that time; I thought I would eventually hear something from Mr. Dunfee, that is the way it stood; I hadn't heard anything.

(Q.) What made you think you would hear anything from him?

(A.) Because I was fifty-fifty in the property.

(Q.) On that expired contract?

(A.) Yes, and he never got no extension, and never did anything of the kind, then my interest stopped there, also my stockholders, and they understood it that way; Mr. Dunfee let that go by the board, and never got it again; I was out, I took it absolutely upon his assurance that he could get it.

(Q.) Your idea was if he ever in the future got an interest in the Orleans, then you would spring your fifty-fifty interest on him? (A.) Yes, sir.

(Testimony of C. A. Terwilliger.)

(Q.) And in the meantime you would do what you did do, nothing? (A.) Beg pardon?

(Q.) And in the meantime you would do what you did do, namely, nothing?

(A.) I could not do anything because I tried before the lease expired with no results; I could not get Mr. Dunfee to [131] see me, he was in Los Angeles twice.

(Q.) Did you write Mr. Dunfee to come to Los Angeles to see you until the company ran out of funds?

(A.) I think before that, when we were mining right along, and getting good ore; I think I have the letters here to refer to right now.

(Q.) Answer the question first.

(A.) That is written evidence and I can refer to it; that is the only way I can tell you the date.

(Q.) The fact is you never hesitated to come to Nevada on the business of the lease so long as the company had money to pay your expenses; is not that it? (A.) No, sir.

(Q.) And when the company ran out of money to pay your expenses then you tried to compel Mr. Dunfee to come to Los Angeles to see you?

(A.) No, sir; there is several hundred dollars now that I paid out coming up here that has not been taken care of, and I never said anything about it.

(Q.) How many trips?

(A.) This last trip was one.

(Q.) This present trip?

(Testimony of C. A. Terwilliger.)

(A.) No, the one I made in 1918, has *been* been covered, any of them at all.

(Q.) How many trips did you make to Nevada?

(A.) I think it was three or four.

(Q.) And the thousand dollars would not cover it?

(A.) I say this last trip hasn't been reimbursed.

(Q.) Did you receive a letter from Mr. Dunfee in 1920, in which he said, "You know as well as I do we have to do sixty shifts a month"?

(A.) I don't remember that letter. [132]

(Q.) Well, did you or did you not receive such a letter?

(A.) I don't remember of having received such a letter, where he said you know as well as I do we have to do sixty shifts a month; I don't remember of ever receiving that letter, I don't think I did.

(Q.) When he wrote you that he could get a lease for two and a half years if you and he could get together on it, you understood that was in contemplation of the present lease running out, didn't you?

(A.) Well, I—

(Q.) Did you not understand that?

(A.) Well, in my mind it would be a renewal, that we had discussed before.

The WITNESS.—(Continuing.) I think the regular meeting day of the board of directors of the Orleans Company was the 24th or 25th of June. I attended to the organization of the company in Arizona; it was turned over to the Stoddard Incorporating Company of Los Angeles, with offices in the

(Testimony of C. A. Terwilliger.)

Van Nuys Building. I think it is a branch office of the Phoenix, Arizona, incorporating company. I think the Phoenix company held the organization meetings for the first year. I think it adopted the by-laws. I think I notified Dunfee to turn all papers to E. Carter Edwards, secretary of the company. I think the charter was sent to me and I sent it and the papers; all of them that were ever returned to me I think were sent to Mr. Edwards. I don't know as I examined them in detail. I think I read the by-laws to some extent, but haven't them committed to memory.

(Q.) Well, you know that the regular meeting day of the board of directors is the first Monday in June, September, December and March, don't you?

(A.) Well, I could not swear to it. [133]

The WITNESS.—(Continuing.) At any rate, after the mine closed down I never attempted to attend a meeting. I was away, and they had their board of directors in Goldfield for that purpose, for doing business without me being present, that was understood when the three directors went in there; I was down there a long ways from them.

(Q.) Is that true also with respect to stockholders' meetings?

(A.) Well, I think we had stockholders' meetings in Los Angeles a couple of times, Mr. Dunfee and myself.

(Q.) You don't mean a couple of times, do you?

(A.) I don't know how many times it was. Once I believe I had in mind.

(Testimony of C. A. Terwilliger.)

(Q.) Did you know how many shares of stock could demand a special stockholders' meeting?

(A.) I don't know that I knew exactly.

(Q.) Well, I will read this to you and possibly it will refresh your recollection.

Mr. FRENCH.—If the Court please, I don't want to make any technical objection, and I am perfectly willing if those are the original by-laws to accept them, but I do object to cross-examination on a piece of paper when we don't know what it is.

Mr. TILDEN.—They purport to be the original documents from the Phoenix office.

The COURT.—Hand them to counsel and see if he has any objection.

(A short recess is taken at this time.)

Mr. FRENCH.—If the Court, please, regarding these by-laws, if counsel assures me these are the only by-laws, I will withdraw the objection, but I cannot tell whether they are or not, they have not been identified.

Mr. TILDEN.—On the assurance of Mr. Edwards, the [134] secretary, I assure counsel they are the by-laws.

Mr. FRENCH.—We will withdraw the objection.

Mr. TILDEN.—(Q.) Did you know that under the by-laws any one owning a fourth of the outstanding stock could demand a special stockholders' meeting? A. No.

(Q.) You never did demand one, did you?

(A.) I don't think I ever did.

(Q.) Why do you say you don't think so?

(Testimony of C. A. Terwilliger.)

(A.) No; no, I never demanded one.

(Q.) You know the annual meeting, the regular annual meeting is held on the 25th of June of every year, when it is held; that is, that is the date provided for its holding?

(A.) I think that is what we agreed upon.

(Q.) Do you recall at one stockholders' meeting that was held at Los Angeles a resolution was passed that all future meetings should be held at Los Angeles? A. At Los Angeles?

(Q.) Yes, future stockholders' meetings.

(A.) It seems to me as though that is in my mind.

(Q.) You have seen the minutes, have you not?

(A.) The minutes of that meeting we had in Los Angeles?

(Q.) Did you ever look at the minute-book?

(A.) I don't think I have seen the minutes of that meeting we had in Los Angeles.

(Q.) You don't think so?

(A.) I might have seen them.

Mr. TILDEN.—I will make the same assurances about these minutes.

Mr. FRENCH.—Very well.

Mr. TILDEN.—(Q.) And I call your attention to what purports to be the minutes of the stockholders' meeting held in Los Angeles, August 14, 1917, and ask you if you ever remember seeing them?

(A.) No, I don't remember ever seeing those.

[135]

(Q.) Did you attend this meeting?

(Testimony of C. A. Terwilliger.)

(A.) I think I did.

(Q.) Are you uncertain about it?

(A.) I think that was the date we held the meeting in 1917, I think.

(Q.) Whatever the date was did you attend the meeting? (A.) I attended that meeting.

(Q.) Do you recall whether or not a resolution was passed to this effect? It was duly moved and seconded that hereafter the annual stockholders' meeting be held in Los Angeles; the motion was put and carried unanimously; do you remember that that occurred?

(A.) My mind is not fresh on it, but it seems to me there was something to that effect.

(Q.) You were interested to have the meetings held in Los Angeles, weren't you?

(A.) Well, the stockholders all being down there, I was.

(Q.) Now during any of this period after the mines were shut down, were any regular meetings of the stockholders held?

(A.) I didn't understand you. (The reporter reads the question.)

(A.) I don't think so.

(Q.) Why do you say you don't think so?

(A.) Well, I can't remember of any being held, I don't think there were.

(Q.) Do you think it is liable any would have been held without your remembering it?

(A.) Well, I don't think I have attended any.

(Q.) Do you know of any having been held?

(Testimony of C. A. Terwilliger.)

(A.) No.

WITNESS.—(Continuing.) It was my understanding that after the mines shut down the mine conditions were worse in the respect that the Brady mill was about to cease operation. With [136] the cessation of operations by the Brady mill it was necessary then to haul the ore sixteen miles, and from that point ship it to Tonopah. That called for a higher grade of commercial ore than tho the mill were running.

(Q.) In your complaint you charge Mr. Dunfee with practicing concealment; what concealment did he practice?

(A.) Well, I understood that he was in Los Angeles a couple of times, I was given information, and I never saw him, and I wanted to meet him there; I had a letter and he said he was sorry that he could not meet me in Los Angeles, and I knew nothing of this transaction after the time it took place until in July, 1921; there was a number of months you mentioned this morning, thirteen or fifteen months, or whatever it was, that I knew nothing about it; I was interested with him and put up money—

(Q.) You are talking about the period after the lease expired?

(A.) Well, and during the time it run, up to 1920; he was in Los Angeles I think two different times, and never saw me.

(Q.) Was that the only concealment that he practiced?

(Testimony of C. A. Terwilliger.)

(A.) Well, I knew nothing about the operation. I had no letters, no answers to my letters up until the time that I got a letter in 1920; I had been in correspondence with him more or less all the time.

(Q.) Is not this your idea, Mr. Terwilliger, that because he didn't communicate with you, he was practicing concealment?

(A.) As far as my having any information in regard to his—

(Q.) Answer the question.

Mr. FRENCH.—He is answering it. [137]

Mr. TILDEN.—(Q.) Is that your idea, that because he didn't communicate with you he was practicing concealment?

(A.) Because I didn't hear anything from him, that is what I based my opinion on; yes, sir.

(Q.) That situation began on March 26th, 1920, didn't it?

(A.) No, before that; I had written to him in 1919.

(Q.) Well, when you last heard from him on March 26th, 1920? (A.) Well, yes, it had—

(Q.) Then this concealment commenced March 26th, 1920?

(A.) No, sir, in 1919; he was in Los Angeles, and I never saw him at all; I was in Los Angeles I think at that time.

(Q.) Try to follow me, Mr. Terwilliger. You say that because he didn't communicate with you he was concealing things from you; now he did communicate with you up to March 26th, 1920?

(Testimony of C. A. Terwilliger.)

(A.) There was a lapse of time between that time that I never heard from him.

(Q.) Don't you understand what I am driving at?

Mr. FRENCH.—I think the witness is answering; he says there was a lapse of time between, and he was trying to explain and then the interruption came.

The COURT.—Ask the question again.

Mr. TILDEN.—I will put the question again.

(Q.) He did communicate up to March 26th, didn't he, so if there was any concealment before that it was broken then; up to March 26th, 1920, there was communication between you from time to time.

(A.) I can't say that unless I can refer to letters there, and find them, I don't know what the correspondence will show.

(Q.) Well, after March 26th there wasn't any communication between you and him, was there?
[138]

(A.) I don't think I received another letter from him after that time.

(Q. And you didn't write him any letters after that time, did you?

(A.) I don't remember that I did.

(Q.) Won't you answer that categorically, yes or no?

(A.) As my mind serves me, no, I didn't write him after that, I don't think.

(Q.) When did you begin to suspect after March 26th, 1920, that he was concealing things from you?

(Testimony of C. A. Terwilliger.)

(A.) Well, I didn't begin to suspect it after that time, it was before that, that I didn't get into communication with him in anywise that I began to feel, that is, that I wasn't getting any intelligence on the property either one way or the other, that was before that time. After that time, and after the lease ran to a certain time and expired, why I didn't know what position the property would be in, only through what he would do, that is all, I had no way of—I had never got a lease, never got an extension, never communicated with the French Company, didn't know any of them, didn't know their address, so I could only wait and abide my time until I heard something from Mr. Dunfee, that is the way I felt about it.

(Q.) Did you have any anxiety about the property after March 26th?

(A.) At all times I had my interest in my mind.

(Q.) You know the difference between anxiety and interest, don't you?

(A.) I had had anxiety all along up to 1920, and I had written and written, and received no answers to my letters, and one letter was returned, and I had more or less become so I didn't believe I could get results by writing, that I would have to see Mr. Dunfee, that he would have to come and see me, and that we [139] would get together eventually.

(Q.) Did you make any efforts to raise any money after March 26th, 1920? (A.) No, sir.

(Testimony of C. A. Terwilliger.)

(Q.) Did you make any efforts to raise any money after the mine closed down?

(A.) I made all kinds of efforts to get together—

(Q.) Answer the question.

(A.) Yes, sir, I did; in a letter there. It is in letter form; I can show you.

(Q.) I don't want the letter. I want you to tell me whether you made any efforts to raise money.

(A.) Yes, sir, I made an effort to get in conference with Mr. Dunfee so we could formulate a plan to raise money for that sole purpose.

(Q.) Did you make an effort to raise money on any plan you had used before?

(A.) Not at that time; we would get together and formulate a plan, that was my understanding the last time we talked about it.

The WITNESS.—(Continuing.) I had different conferences with Mrs. Dunfee. I don't remember the dates of the conferences. I don't think that I saw her after the lease expired. I cannot say whether I did or did not see her in the fall of 1920; I don't know; I might have seen her. I don't remember whether or not I met her on the street as she was about to get on a street-car in Los Angeles. I met her one time on the street in Los Angeles, but I don't know whether it was in 1919 or 1920, or 1918; I know that I met her for just a few minutes; she was going up the street.

(Q.) Did you not on Broadway, near Eighth, in Los [140] Angeles in September, 1920, meet Mrs.

(Testimony of C. A. Terwilliger.)

Dunfee and speak with her about Mr. Dunfee's operations in the Orleans?

(A.) I don't remember that meeting in 1920, in September, 1920.

(Q.) Did you ever at any meeting with her speak to her about Mr. Dunfee's operations on the Orleans, and with respect to one Harry McMahan?

(A.) Never; never remember mentioning Harry McMahan.

(Q.) You don't propose to say that you didn't mention him, do you?

(A.) I say I never mentioned him that I know of; never.

(Q.) Did you ever hear of Harry McMahan?

(A.) I can't recall who he is now.

(Q.) Did you ever hear of him?

(A.) I don't know; I can't place him; can't tell who he is, Harry McMahan; would not know him if he was brought in here; could not identify him; don't know him; don't know who he is connected with; don't know him.

(Q.) Did you ever hear of a mining man named Harry McMahan? (A.) McMillan?

(Q.) McMahan?

(A.) No, sir; can't place the man at all.

(Q.) Didn't you say in effect to Mrs. Dunfee, at that time, you understood that Mr. Dunfee was dealing with Harry McMahan, or with McMahan on the Orleans? (A.) No, sir.

(Q.) And that if he sold the Orleans you would put him in the pen, or something of that sort?

(Testimony of C. A. Terwilliger.)

(A.) No, sir.

The WITNESS.—(Continuing.) I never heard of Gordon Bettles; never heard of Mr. Dunfee's dealing with Gordon Bettles with respect to the Orleans. I have heard of the Tonopah Mining Company but never heard of Dunfee's dealing with them with respect [141] to the Orleans; never heard of it in Los Angeles. I heard of it in Tonopah; that was in 1921, the latter part of July. That is the time I first heard of Mr. D'Arcy; that is, to recall who Mr. D'Arcy was; that is about the first time I had heard of Mr. D'Arcy. I know William Sirbeck. I never heard of him in connection with the Orleans until I saw it in the answer in this case.

(Q.) In one of the letters that you read from Mr. Dunfee, do you recall that he said that he would keep your representative in Hornsilver advised?

(A.) My representative? I never had a representative here; never. I asked Mr. Dunfee for a job for that man, and he was given a job three months; that was the man, John Winkler.

(Q.) John Winkler?

(A.) Yes, sir, John Winkler.

(Q.) That is the man you sold the stock to?

(A.) Yes, sir.

(Q.) Do you recall that he made that reference in his letter to your representative in Hornsilver?

(A.) I believe that he said some place there that he would ask my man, he didn't say representative, he said my man John, to keep me posted, I think it was. I think that is it.

(Testimony of C. A. Terwilliger.)

(Q.) How long did Mr. Winkler stay in Hornsilver?

(A.) Three months, I think; he worked there three months, I think.

(Q.) Did you have him write you concerning Hornsilver while he was there?

(A.) He wrote me the letters; I think Mr. Dunfee gave him every bit of the intelligence he wrote me, I think; I think he referred to it in the letters, Mr. Dunfee telling thus or so, or he was out with the truck that was hauling ore up to the mill, and he would write me once in a while, I think.

(Q.) How many letters did he write you? [142]

(A.) Twelve or fifteen letters, I think.

(Q.) In the course of three months?

(A.) I imagine about that; might possibly be more.

(Q.) And that was in 1919? (A.) I think 1918.

(Q.) Until when?

(A.) Well, I think it was March, April, May, June, along there, I think it was; I think that is about the time he was there.

The WITNESS.—(Continuing.) I did not have anybody else in Hornsilver writing me. I did not take any newspapers from the southern part of the state, but I used to read the Goldfield papers and Reno papers quite often when I would be in Los Angeles; the "Goldfield Tribune," whatever the papers are there; I remember I read them once in a while, but I wasn't a subscriber to any Nevada paper. I would go to the news-stand and buy them

(Testimony of C. A. Terwilliger.)

once in a while. I didn't make a practice of it; Mr. Dunfee sent me several papers, at different times while the property was running. My idea in getting the Southern Nevada papers from the news-stand was that I was interested in Hornsilver, and I was also interested in the state, that is, in a general mining way, and I would get the papers and look them over. I can't tell you how long I continued to do that; there was no definite time, no practice established. I think it was about the middle of July, the 15th I will say, that I discovered the facts set forth in my complaint, in regard to the disposition of the property of the Orleans Mining and Milling Company. I met on the street a man by the name of John Duffy who lives at the Colonial Hotel in Los Angeles. I have known him a number of years and he also knew Mrs. Dunfee. We stood there and talked a few minutes, and he said, "You know Dunfee is selling the property." This man Duffy is a mining man at the present time at Randsburg, I think; I don't know anything about his business at all except that he is a miner. I have known him for seven or eight [143] years. I don't know whether or not he ever operated in Hornsilver. I don't know where he got his information. It was three or four days after that conversation that I came up to Nevada,—within a week anyway, I believe.

(Witness is shown copy of "Goldfield Tribune.")

(Q.) Do you recognize this as a copy of the "Goldfield Tribune"? (Hands to witness.)

(Testimony of C. A. Terwilliger.)

(A.) I want to see the date of it.

(Q.) You can't tell the "Tribune" by the date; just look at the top of it. (A.) Yes, sir.

(Q.) Do you remember a "Tribune" of March 26th, 1921?

(A.) I don't know as I read that; what is the date of it?

(Q.) March 26th, 1921?

(A.) No, I never saw that paper until afterwards; I never saw that paper at all until after this—until after I had met Mr. Duffy in Los Angeles.

(Q.) Then how did you come to see it?

(A.) Well, I think I got that paper somewhere. I don't know just exactly where I got it, but I got that paper.

(Q.) March 26th.

(A.) Yes, sometime I got that paper somewhere.

(Q.) Can you tell us whether you got it at the news-stand?

(A.) No, I can't tell you where I saw the paper first; I believe I read something to that effect. I don't know where I got the paper or anything.

(Q.) You read the article in it about Hornsilver?

(A.) I don't know that I read it in detail; I saw where Mr. Dunfee sells the property; isn't that the heading?

(Q.) "Dunfee to Start Shipping from Hornsilver." Can you tell the Court whether you read the article or not? [144]

(A.) No, I think I am confused on that paper; I don't think it is the paper I thought it was, if it

(Testimony of C. A. Terwilliger.)

is marked the 26th; the paper I have reference to is the paper with regard to a transaction with Mr. D'Arcy.

(Q.) Well, I will show it to you. (Hands paper to witness.)

(A.) I think that is an account I read, although I am not sure. I know I read an account; I can't identify either one of those newspapers.

(Q.) There is a paper of the middle of July, 1921; is that where you got your information of the Dunfee deal?

(A.) No, sir, Mr. Duffy told me; the first news I had of any kind was when Mr. Duffy told me; all I ever learned through newspapers was after Mr. Duffy had told me about the transaction.

(Q.) I understand your testimony to be it is possible that you saw this paper of March 26th, 1921, containing the article headed "Dunfee to Start Shipping from Hornsilver"?

(A.) I never saw that.

(Q.) You are positive?

(A.) I say no, I never saw that; I testify to that.

(Q.) Well, I will ask you to look at one of April, 1921, April 16th, 1921. I call your attention to an article headed, "Dunfee Breaking Ore Nine Feet Wide at Hornsilver." Did you ever see that?

(A.) No, I never saw that.

Mr. STODDARD.—What is the date of that paper?

Mr. TILDEN.—April 16th, 1921.

(Q.) I call your attention to the "Goldfield

(Testimony of C. A. Terwilliger.)

News" of May 28th, 1921, and to the article entitled "Orleans Ore Body, Seven and a Half Feet Wide, Ten Feet High." Did you ever see that?

(A.) I don't remember that at all; no, sir.
[145]

(Q.) I call your attention to one of June 18th, 1921, and to the article entitled "New Find Is Made in Orleans Mine, Four and a Half Foot Wide of Ninety-dollar Ore Opened up on 580-foot Level."

(A.) No, sir.

(Q.) You never saw it?

(A.) No, sir, never saw it.

(Q.) Did you see the one of June 25th, 1921, calling your attention particularly to an article headed "Shoot in Orleans Mine is Over a Hundred Feet Long, Seven-foot Face of Forty-dollar Ore Now Being Broken by Lessee"? (A.) No, sir.

(Q.) Didn't see that? (A.) No, sir.

(Q.) Did you see an article in the "Tribune" headed, "Sale by Dunfee is \$90,000 Mine Deal"?

(A.) I think I did; that is the one. What is the date?

Q. I probably unintentionally misled you on this first one I showed you, because I had that covered; there are two articles; the one you refer to is headed "130-foot Length of \$30 Ore in Orleans Mine at Hornsilver." Now, you say you did see the articles headed "Sale by Dunfee is \$90,000 Mine Deal"; "D'Arcy Plans Mill." When did you see that?

(Testimony of C. A. Terwilliger.)

(A.) I never saw that until after I had had a conversation with Mr. Duffy on the street in Los Angeles.

(Q.) Notwithstanding your practice of buying the "Goldfield Tribune" at the news-stand in Los Angeles? (A.) I never made it a practice.

The COURT.—What is the date of the paper that contains "Sale by Dunfee is \$90,000 Mine Deal"?

Mr. TILDEN.—July 16th, 1921. We will offer these papers, may it please the Court, in connection with this witness' admission, that he did, whether he made a practice of it or not, [146] from time to time purchase the "Goldfield Tribune" in Los Angeles, and leave it as a matter of argument to infer it is peculiar that he didn't get those particular papers.

Mr. STODDARD.—We will object to the offer, if your Honor please, on the ground it is not a proper offer, not tending to prove or disprove any issue in this case; and for the further reason that the witness, plaintiff in this case, has denied ever having seen those papers until after the time he otherwise became informed of Mr. Dunfee's operations in the former leased property. The plaintiff in this case is not connected up in any way with knowledge of the statements contained in these papers concerning Mr. Dunfee's operations; he has testified that he did not see these articles, excepting this one of July 16th, which he saw subse-

quent to the time Mr. Duffy saw him, and we base our objection on that ground.

The COURT.—I will admit that one of July 16, 1921. I think that is the only one he admits that he saw.

Mr. TILDEN.—Yes.

The COURT.—That may go in.

(The "Goldfield News," of date Saturday, July 16, 1921, is admitted in evidence, marked Defendant's Exhibit "H," and the article identified by the witness reads as follows:)

DEFENDANT'S EXHIBIT "H."

"Sale by Dunfee is \$90,000 Mine Deal—D'Arcy Plans Mill.

Both Sides Lucky—Dunfee Shows He is Good Miner and 'Sticker'—Started Work in January, Broke, and Makes Good—Climbs in and Out of 600-Foot Shaft and Works Alone for 52 Days—Now Loading Seventh Car.

A. I. D'Arcy of Goldfield and San Francisco associates have taken over the lease of J. W. Dunfee on the Orlean Mine at Hornsilver for a price reported to be \$50,000 and have also acquired for \$40,000 Dunfee's option to purchase. This ends months of negotiation in which numerous persons have tried to turn the deal.

Dunfee let go of his bonanza for two reasons: First, because he can clear as much in this way as he could by the shipment of ore over a long period,

and second, he is to have an interest of 150,000 shares of stock in the company that will own the mine. [147] The latter was his main reason for letting go of the mine. D'Arcy evidently was also an important factor in Dunfee's decision, for the latter said yesterday: 'The mine has been sampled by a good many people, but I feel that in D'Arcy we have the best man in the state to handle this deal.'

There are a number of remarkable features in connection with the negotiations that have been going on—luck for Dunfee, hard luck for others, and a humorous side.

In six months the value of Dunfee's lease increased from \$2500 to \$50,000. In December of last year he offered to walk off the ground and turn everything over to W. E. Sirbeck if the latter would give him \$2500. Sirbeck made heroic efforts to get some one to back his judgment that the Orlean would be a winner, but he was told that Hornsilver was dead and that there was no more ore there. A firm of New York brokers told him they could not sell two bits worth of stock in a Hornsilver company and that they would not back his deal. But Sirbeck foresaw what eventually did occur and he persisted. On April 5 he obtained another option, this time for \$10,000 cash, \$10,000 in 90 days and 10 per cent of the stock in any company he would organize. These terms, as in all cases, were for Dunfee's lease and his option to buy the mine for \$40,000.

Still Sirbeck could not induce any one to listen to him and so the Tonopah Mining Company became interested at a time when Dunfee had opened the ore for only 35 feet—fortunately for him. Dunfee made practically the same terms to the Tonopah Mining as he had in giving the second option, but the company made counter-proposals and the deal was declared off by Dunfee. The next round of drill holes fired by Dunfee after the Tonopah Mining deal had fallen through brought the first of the higher grade ore—and Dunfee was saved by good luck. It was then that he determined to take a chance, backed by his judgment as an expert miner that the shoot was a whale, and he decided to make no more deals to sell until he had determined what was in the ground ahead. Here Dunfee's judgment proved good.

The Orleans is owned by the Champ D'Or French Gold Mining Company, with offices in Paris and London. Dunfee went from Goldfield to Hornsilver in 1912 and took charge of the work of this company, which worked eight months of that year. Then E. Perrier de la Bathie, who was representing the company, went to Paris to raise more money and he returned here in 1914, just as the war started, and he returned to France. In March, 1915, Jean Perrier Charra came to Goldfield to close the mine during the war and he gave Dunfee a lease and option to purchase which was renewed in January of this year. This lease and option to

purchase is what D'Arcy and his associates have acquired.

Flat broke, Dunfee started work on June 22, 1915, by sinking a winze from the 150-foot level of the Orleans shaft. This shoot extended to 350 feet and from it Dunfee shipped \$90,000 worth of ore. Then in 1916 he sunk the Dunfee shaft, to 500 feet. The ore shoot faulted at about 380 feet; then he found a shoot on the fifth level, and another 67 feet long, on the sixth level. In all, he produced during his leasing operations \$263,000 worth of ore, and all of the profits he 'blew,' according to himself. Then, again flat broke and without even a grubstake, he started work in January of this year, and, working along, he climbed in and out of the 600-foot shaft every day—sometimes several times—for 52 days, [148] driving along on a five-inch seam of low-grade ore. Finally, at 203 feet from the shaft, the ore was found—the beginning of the shoot that since has attracted the attention of all Nevada.

Dunfee commenced to save ore. The first carload assayed \$22.65, the second \$27.75, the third \$32.55, the fourth \$49. He now has two carloads of \$50 ore on the road to the MacNamara mill in Tonopah and another is being loaded. These figures show that there has been a constant increase in the value of the ore as the shoot was entered and confirm the statement that the best ore is near the face of the drift. The shoot has now been opened for 130 feet and the production has been made

(Testimony of C. A. Terwilliger.)

practically without stopping. Six ounces has been the highest silver content of this ore and the remainder of the value has been in gold.

Roger Downer of the Goldfield firm of Downer Brothers, assayers, is now sampling the drift on the 580-foot level and the result of his work thus far has made him a firm and enthusiastic believer in the possibilities of the mine and the actual value of the big ore shoot.

The ore contains small quantities of vanadinite, a resinous, yellowish mineral containing lead and vanadium, the former in quantity to aid in the cyanidation of the ore, treatment to which it is readily amenable. As to milling, the ore is considered in every way ideal for simple cyanidation, which adds greatly to the value of the mine to the new owners, as the plan of Mr. D'Arcy is to first block out the ore and then build a mill."

The WITNESS.—(Continuing.) I can't tell you the exact length of time after I talked to Mr. Duffy that I saw this paper of July 16th, but it was a very short time. I think I got a paper as soon as I could get one. I don't know whether I got it in Los Angeles, but just soon afterwards I got that paper. I think I got it in Los Angeles. I will say yes, that I got it in Los Angeles. I think I got the paper in Los Angeles. I went immediately or within five days to Tonopah. I didn't stop in Goldfield. I think it was the night I got there that I employed Mr. Atkinson to look into the proposition as my counsel. I had him draw up a letter to

(Testimony of C. A. Terwilliger.)

serve on the D'Arcy Company, on the bank and Mr. Dunfee. He drew it up; I didn't dictate it.

(The letter in question is identified by the witness, admitted in evidence without objection, marked Defendant's Exhibit "I" and is as follows:)

DEFENDANT'S EXHIBIT "I."

"H. H. Atkinson,
Attorney and Counsellor at Law,
415-417 State Bank Building,
Tonopah, Nevada.

August 2, 1921. [149]

John S. Cook & Co., Goldfield, Nevada.

Orleans Hornsilver Mining Co., Goldfield, Nevada.

J. W. Dunfee, Goldfield, Nevada.

Gentlemen:

You and each of you are hereby notified that the Orleans Mining and Milling Company, a corporation, claims ownership of that certain lease on the Orleans No. 1, Orleans No. 2, Orleans No. 3, Orleans Extension and Orleans Extension No. 1 lode mining claims, situated in the Hornsilver Mining District, Esmeralda County, State of Nevada, granted to said J. W. Dunfee by the owner of said claims on or about January 1, 1921, and claims all of money and shares of stock which said J. W. Dunfee is to receive by virtue of his assignment of said lease to persons from whom said Orleans Hornsilver Mining Company now has or claims ownership.

(Testimony of C. A. Terwilliger.)

The Orleans Mining and Milling Company consents to the said sale and assignment of said lease as far as the consideration is concerned, but claims all of said consideration, and hereby notifies all of you not to pay or deliver any of said consideration to said J. W. Dunfee, his assigns or to any person acting for, by or thru said J. W. Dunfee, but to pay and deliver said consideration as it becomes due according to the terms of said contract of sale and assignment to a trustee for the benefit of said Orleans Mining & Milling Company, and said trustee is hereby designated and appointed to be John S. Cook & Co., a corporation engaged in a banking business, at Goldfield, Nevada, said trustee to hold said funds, shares of stock, or consideration heretofore mentioned until the lawful owner thereof is determined.

Yours very truly,

ORLEANS MINING & MILLING CO.,

By C. A. TERWILLIGER (Signed),

Vice-President." [150]

The WITNESS.—(Continuing.) Referring to the fact that the letter Defendant's Exhibit "I" mentions a lease dated January 1, 1921, and my complaint says that the lease was obtained on or about June, 1920,—I think they are the same lease. (Witness is shown lease of June, 1920.) I don't think I ever saw this before. I don't remember supplying Mr. Cook with this lease. (Witness is shown lease dated January 1, 1921.) I don't believe I have ever seen that lease before. I don't

(Testimony of C. A. Terwilliger.)

know on what lease Mr. Atkinson based his letter, Defendant's Exhibit "I." The lease I am suing on is any leases which he might obtain. I don't know what they are, whether it is June or January.

(Q.) You don't mean to tell the Court you alleged in your complaint that he had conceived a fraudulent scheme in March, 1920, to obtain a lease some time in the indefinite future, do you?

(A.) Yes, that I have no knowledge of whatever.

(Q.) Any time? (A.) Yes, sir.

The WITNESS. — (Continuing.) I employed Mr. Atkinson as counsel in the beginning. I could not stipulated just what to do, because I would not be the dictator of his action. He was my counsel up to a certain time; that was just before I employed Cooke, French & Stoddard. Arrangements were made for his services satisfactory to him. I employed Mr. Atkinson as counsel in the beginning, and at such time as he notified me, up until September, that it was impossible to go on with the case along the lines we had outlined; then I immediately employed Cooke, Stoddard & French. Mr. Atkinson outlined some plans as my counsel. That notice is the procedure; then from time to time I had letters where he would try to get intelligence on the case; that was about the nature of the procedure. It was quite a few months before I concluded to change counsel—from the middle or latter part of July until March [151] of this year—until I *release* him as counsel and notified him that I was going to consider other counsel if

(Testimony of C. A. Terwilliger.)

it was agreeable, and he approved of it. I employed him to investigate in detail and I deemed he would do whatever he considered necessary as my counsel. I think he applied to Mr. Edwards for leave to examine the corporate records and papers pertaining to the case. I think I signed a letter authorizing Mr. Edwards to show him everything. I think he looked at the books and everything a very short time after I employed him.

(Q.) Do you know whether or not he encountered any concealment on anybody's part?

(A.) Well, I don't think he ever mentioned to me anything about these letters you have shown me here, or anything of that kind.

(Q.) Did he find a disposition on anybody's part to conceal anything from him?

(A.) I don't know.

Redirect Examination by Mr. STODDARD.

John Winkler, who I stated in my direct examination was working upon the property during its operations, and sent some reports or letters to me, worked upon the property approximately three months. I believe in 1917 or 1918 in March, April and May or near about that time. I replied to the letter of March 26th, 1920, which I stated in my cross-examination is the last letter or communication which I received from Mr. Dunfee. I think that I replied to it on May 2d, 1920, by the letter which has been read in evidence and is in the pleadings. I never received a reply to that letter. The money paid to me by the corporation for expenses,

(Testimony of C. A. Terwilliger.)

as testified on my cross-examination, was, besides traveling expenses for attorney's fees, incorporating, books and seals and such things as that. It includes [152] the items that are mentioned in my contract with Mr. Dunfee, dated September 2, 1916. When I say attorney's fees I mean attorney's fees for the incorporation of the company. They amounted to around two hundred or two hundred and fifty dollars, including the fees of the Secretary of Arizona and the filing fee.

(Q.) I will hand you what purports to be a lease, dated June 5, 1920, from what has been designated here as the French Company, to J. W. Dunfee, purporting to lease the Orleans No. 1, Orleans No. 2, Orleans No. 3, Orleans Extension and Orleans Extension No. 1, mining claims in Hornsilver Mining District, the term of the lease being for one year from date, and ask you to state to the Court if you have ever seen that lease, or a record of it or a copy of it at any time.

(A.) No, sir, not to my knowledge.

Mr. TILDEN.—If you want that in I will consent.

Mr. STODDARD.—We would like to offer it at this time, I think it will save time. We will offer this lease in evidence, if your Honor please.

The COURT.—What is the date of that?

Mr. STODDARD.—The lease is dated June 5, 1920, from the French Company to J. W. Dunfee, as lessee; term of the lease for one year, and leasing the mining claims mentioned heretofore in this ac-

tion. Endorsed upon the face of the front page of the lease in writing, are the words, "Cancelled January 1, 1921," under which appear the names "E. Carter Edwards, Attorney-in-fact," and "J. W. Dunfee." The lease is signed by the French Company, by E. Carter Edwards, Attorney-in-fact, and by Mr. Dunfee as lessee. That is all at this time.

(The lease is marked Plaintiff's Exhibit No. 11, and is as follows:)

PLAINTIFF'S EXHIBIT No. 11.

[Written across face of instrument:] "Cancelled January 1, 1921. E. Carter Edwards, Attorney-in-fact. J. W. Dunfee."

"THIS AGREEMENT, made and entered into this the Fifth day of June, 1920, by and between LE CHAMP D'OR FRENCH GOLD MINING [153] COMPANY, LIMITED, a Corporation duly organized and existing under and by virtue of the laws of England, having its principal place of business in the City of London, England, at No. 7, Old Broad Street, E. C., and an administrative seat in the City of Paris, France, at No. 1, place Boieldieu, party of the first part and hereinafter referred to as the Company; and Mr. J. W. DUNFEE, party of the second part, and hereinafter referred to as the Lessee;

WITNESSETH, that the Company, for and in consideration of the rents, covenants and agreements hereinafter reserved and expressed, to be kept and performed by the Lessee, has leased and

let, and by these presents does lease and let unto the said Lessee, the following described premises and mining property, situate near the town of Hornsilver, County of Esmeralda, and State of Nevada, to wit:

All these certain lode mining claims, situated in Hornsilver Mining District, Esmeralda County, Nevada, known and designated as Orlean No. 1, Orlean No. 2, Orlean No. 3, Orlean Extension, and Orlean Extension No. 1, at and near the town of Hornsilver, and also the machinery erected thereon together with hoist, tools, rails, etc., and more particularly described in Schedule No. 1 hereto annexed.

TO HAVE AND TO HOLD, for the purpose of mining, from the date hereof up to and including the First day of June, 1921 M said Lessee in consideration of the premises, covenants and agrees with the Company, its successors and assigns, to work immediately after 10 days from the date of this agreement, and to work the same continuously in a workmanlike manner, keeping the same securely timbered and to pay royalty to the Company, its agent or attorney, as rental for said premises, as follows, to wit:

ROYALTY, flat rate of Twenty (20%) per cent on the full value of the ore shipped by the Lessee, after deducting the sum of Ten Dollars (\$10.00) per ton for transportation and reduction expenses and also the bullion tax, the said sum of ten dollars being agreed upon by both parties. The said Royalty to be retained by purchaser of ores and

thereupon immediately paid by said purchaser to the credit to E. Carter Edwards, attorney in fact of the Company, or his successor.

It is further understood and agreed between the parties hereto, that the Lessee shall give the Company a three (3) days' notice of the shipment of any and all ores and that the said Lessee shall work at lease sixty (60) shifts of one man per shift during each and every month continuously during the lifetime of this lease and all work to apply to assessment work of the Company.

During the term of this Lease the Company shall at any time have the right to ascertain the existence, state and condition of the tools, machinery and material, as described in Schedule No. 1, and to call upon the Lessee to make good to the Company any parts of said tools, machinery and material that might be missing, destroyed or damaged. And the Lessee, at the expiration of this Lease, agrees to make good to the Company all said tools, machinery or material that might have been lost, destroyed or damaged, during the term of said Lease.

No assignment of this Lease, or right to sublet said premises, or any part thereof, shall be made or given, without the consent in writing of the Company being first had therefor. [154]

It is further understood and agreed that should the Lessee fail to work at least sixty shifts of one man per shift during any month of the life of this lease, this lease will terminate at the end of the following month, and any and all ore extracted by

the Lessee during the month the Lessee shall fail to work at least sixty shifts as aforesaid, and not removed the month following such failure to work, shall be and remain the property of the Company.

It is hereby mutually understood and agreed, that in case any disagreements or disputes shall arise between the parties hereto as in their respective rights under this lease, or what is due and owing thereunder from the Lessee to the Company, for royalty or for any other matter that shall come up for settlement or adjustment under its terms, that the Company shall in such case or cases choose one person, the Lessee a second person, and these two a third person, as arbitrators, and such three persons so chosen shall have the power to hear, arbitrate, and finally decide all such matters or questions that shall arise or come up for settlement under the terms of this lease, and neither party shall have the right to appeal from the award and decision of such arbitrators, the right of appeal being hereby waived by both parties.

It is further understood and agreed hereby, that in consideration of the sum of One Dollar (\$1.00) to the party of the first part in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, the party of the first part hereby grants and gives to the party of the second part, the right and option to purchase the said Orleans Group of Lode Mining Claims together with the property and fixtures belonging to the party of the first part located thereon, in the Schedule hereto annexed, described, and made a part hereof,

upon the following terms, to wit; The party of the second part hereby agrees to pay to the party of the first part for said mining claims and property, the sum of Forty Thousand Dollars (\$40,000), Ten Thousand Dollars (\$10,000.00) the first payment of said purchase price to be paid down in cash at the date the party of the *second shall* choose to exercise said option to purchase, written notice of the date of exercising said option to purchase shall be given by the party of the second part to the party of the first part, its agent or attorney; Fifteen Thousand Dollars (\$15,000.00) the second payment of said purchase price to be paid within Ninety (90) days from the date said first payment is made, and the balance, to wit; the sum of Fifteen Thousand Dollars (\$15,000.00) within six (6) months from the date of said first payment.

The party of the second part shall have the right to exercise said option to purchase at any time within the life of this lease, and if the option is exercised within the term of this lease, and a part of the payments under said option are made within the term of this lease and a part of said payments shall extend beyond the term of this lease, the party of the first part, in such a contingency, agrees to extend this lease a sufficient time to time necessary to make such payments, as may extend beyond the term.

Upon making full payment for said mining claims and property as herein provided, the party of the first part hereby agrees to immediately

make, execute, acknowledge, and deliver to the party of the second part, his executors, administrators, or assigns, a good and sufficient Deed of Conveyance, conveying and transferring all the right, title, interest and property claim or demand whatsoever of the party of the first part, of, in, or to said [155] Mining Claims and property, free of any and all incumbrance by it suffered or done.

The right to anticipate any of said payments, and to pay off the full purchase price of said mining claims and property, before the dates and times mentioned and set forth for making payments of said purchase price is hereby given.

Time is of the essence of this contract, and promptness is required, and upon any failure to make any payment as herein provided, the party of the first part shall have the right to forfeit all the rights of the party of the second part herein, and to retain all moneys paid hereunder as liquidated damages for the breach of this contract on the part of the party of the second part, and upon any such forfeiture, the party of the first part shall have the right of immediate possession of said property, with or without process of law.

IN WITNESS WHEREOF, The parties hereto, have hereunto set their hands and seals, this 5th day of June, 1920.

LE CHAMP D'OR FRENCH GOLD MIN-
ING CO., LIMITED. (Seal)

By E. CARTER EDWARDS,
Its Attorney-in-fact.
J. W. DUNFEE. (Seal)

SCHEDULE No. 1 ANNEXED TO LEASE
DATED THE FIFTH DAY OF JUNE,
1920.

STOCK OF TOOLS, MACHINERY & SUP-
PLIES AT THE ORLEANS MINE.

- 1 #400 Champion forge blower.
- 1 Blacksmith's vice.
- 1 Large Anvil.
- 2 Mine trucks.
- 1 Jack-screw.
- 2 Windlass drums.
- 75 ft. of $\frac{1}{2}$ inch steel cable.
- 3 Windlass buckets.
- 2 Whims.
- 1 Adze.
- 2 Saws.
- 1 Steel square.
- 5 Shovels.
- 7 Picks.
- 1 Claw hammer.
- 300 lbs. $\frac{7}{8}$ inch drill steel.
- 75 lbs. $\frac{5}{8}$ inch drill steel.
- 1 Ore screen (about 3'6" x 5'), and ore sacknig
funnel.
- 2 Single jack drill hammers (4).
- 1 Pair blacksmith tongs.
- 1 Drill sharpening hammer.
- 1 Ball pointed hammer.
- 1 8-inch monkey-wrench.
- 1 14-inch pipe wrench.
- 3 small mortars.

(Testimony of C. A. Terwilliger.)

400 ft. Air pipe,

1 #417 Western gas engine 25 HP, with self-tipping car, rope, etc., in good order.

Rails and fittings in main shaft and drifts.

1 Building known as the Hotel. [156]

(The house now leased to Mr. Martin, after sold to Tim Connolly, is not included in this Schedule.)

LE CHAMP D'OR FRENCH GOLD MINING CO., LIMITED.

By Its Attorney-in-fact.

Recross-examination by Mr. TILDEN.

I was in Los Angeles, 4419 Finley Avenue, on March 26th, 1920, and remained there almost continually; that is my home and my address where I receive my mail and everything of the kind. I do not recall having left there at any time within a couple of months after that.

(The lease, January 1, 1921, is offered by defendant Dunfee, admitted in evidence without objection, marked Defendant's Exhibit "J," and is as follows:)

DEFENDANT'S EXHIBIT "J."

"THIS AGREEMENT OF LEASE, made and entered into this the first day of January, 1921, by and between LE CHAMP D'OR FRENCH GOLD MINING COMPANY, LIMITED, a corporation duly organized and existing under and by virtue of the laws of England, having its principal place of business in the City of London, England, at No. 7 Old Broad Street, E. C., and an administrative

seat in the City of Paris, France, at No. 1, Place Boieldieu, the party of the first part and hereinafter referred to as the Company; and J. W. DUNFEE, of Goldfield, Nevada, the party of the second part hereinafter referred to as the Lessee;

WITNESSETH: That the Company for and in consideration of the rents, royalties, covenants and agreements hereinafter reserved and expressed, and to be kept and performed by the Lessee, has leased and let, and BY THESE PRESENTS, does lease and let unto the Lessee, the following described premises, mining claims, and mining property, situate at and near Hornsilver, County of Hornsilver, County of Esmeralda, and State of Nevada, to wit:

ALL THOSE CERTAIN LODGE MINING CLAIMS, situated in Hornsilver Mining District, Esmeralda County, Nevada, known and designated as Orlean No. One (1), Orlean No. Two (2), Orlean No. Three (3), Orlean Extension, and Orlean Extension No. One (1), and also the machinery erected and being thereon together with hoist, tools, rails, etc., more particularly described in Schedule No. 1 attached, and made a part hereof.

TO HAVE AND TO HOLD, for the purpose of mining from the date hereof up to the first day of January, 1925, and to be completely terminated and ended on the 31st day of December, 1924, being for the term of four (4) years from date. Said Lessee in consideration of the premises, covenants and agrees with the Company, its successors and assigns, to work immediately after the date of this

Lease said mining claims continuously in a workmanlike manner and minerlike manner, keeping the same securely timbered, and the tunnels, drifts and workings thereof clear and clean of all rubbish, debris, muck or waste, and to pay Royalty to the [157] Company, its agent, or attorney, as rent for said premises, as follows, to wit:

ROYALTY, to be paid hereunder shall be Fifteen (15%) per cent of the full value of all ore shipped or mined from said premises, after first deducting all costs and expenses of treatment, reduction, and transportation, as per milling or smelter returns of the same, such royalty to be retained by the purchaser of said ores, and immediately paid over to E. Carter Edwards, Attorney-in-fact of the Company, or his successor.

IT IS UNDERSTOOD AND AGREED between the parties hereto, that the Lessee shall give the Company Three (3) days' notice of the shipment of any and all ores, and the destination of the shipment.

IT IS ALSO UNDERSTOOD AND AGREED, that said Lessee shall work sixty (60) shifts each and every month during the continuance of this Lease, and all work done shall apply on the assessment work of the Company for said claims.

During the continuance of this lease, the Company shall at any and all times within business hours, have the right to enter in or upon said premises for the purpose of ascertaining the condition of the tools, machinery and material described in Schedule No. 1 hereto attached, and of the Mines,

and the Lessee at the expiration of this lease or earlier determination thereof as herein provided, agrees to make good to the Company for all of said tools, machinery, or tools that shall be lost, destroyed, or damaged, ordinary wear and tear of the same being excepted.

No assignment of this lease, or right to sublet said premises, or any part thereof, shall be made or given, without the consent in writing of the Company being first had therefor, and all assignments or subleases made, except with the consent in writing of the Company first had therefor, shall be absolutely null and void for any purpose whatever.

IT IS FURTHER UNDERSTOOD AND AGREED, that in case any disagreements or disputes shall arise between the parties hereto as to their respective rights under said lease, or what is due or owing thereunder from the Lessee to the Company for royalty or for any other matter or thing whatever that shall come up for settlement or adjustment under this lease, that the Company shall in all such case or cases choose one person, the Lessee a second person, and these two a third person, as arbitrators, and such three persons so chosen shall have the power to hear, arbitrate, and finally decide all such matters or questions that shall so arise or come up, and neither party shall have the right of appeal from the award and decision of such arbitrators, the right of appeal being hereby waived by both parties.

IT IS FURTHER UNDERSTOOD AND AGREED BETWEEN THE PARTIES HERETO, that in consideration of the sum of One Dollar (\$1.00) to the party of the first part in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, the party of the first part hereby grants and gives to the party of the second part, the right and option to purchase the said Orlean Group of Lode Mining Claims together with the property and fixtures belonging thereto attached and located thereon, in the Schedule hereto annexed described, and made a part hereof, upon the following terms, to wit: The party of the second part hereby agrees to pay to the party of [158] the first part for said mining claims and property, the sum of Forty Thousand Dollars (\$40,000.00), Ten Thousand Dollars (\$10,000.00), the first payment of said purchase price to be paid down in cash at the date the party of the second part shall choose to exercise this option to purchase, written notice of the date of exercising this option to purchase shall be given by the party of the second part to the party of the first part, its agent or attorney; Fifteen Thousand Dollars (\$15,000.00) the second payment of said purchase price to be paid within Ninety (90) days from the date said first payment is made, and the balance, to wit: The sum of Fifteen Thousand Dollars (\$15,000.00), shall be paid within six (6) months from the date of said first payment.

The party of the second part shall have the right to exercise this option to purchase at any time

within the life of this lease, and if the option is exercised within the term of this lease, and a part of the payments under said option shall be on dates beyond and outside the term of this lease, the party of the first part, in such contingency, agrees to extend this lease a sufficient time necessary to make such payments, that may so extend beyond the term hereof.

The right to anticipate any or all of said payments, and to pay off the full purchase price of said mining claims and property, before the dates and times mentioned and set forth herein for making payments, is hereby given.

Upon making full payment of the purchase price of said mining claims and property as herein provided, the party of the first part hereby agrees to immediately make, execute, acknowledge and deliver to the party of the second part, his executors, administrators, or assigns, a good and sufficient Deed of Conveyance, conveying and transferring all the right, title, interest, property claim, or demand whatsoever of the party of the first part, free of any incumbrance by it suffered or done.

TIME IS OF THE ESSENCE OF THIS contract, and promptness is required, and upon the failure to work sixty shifts per month, as herein provided, each and every month during the continuance of this lease, shall be ground, at the option of the Company, to forfeit all the rights of the Lessee under this lease, and in the case of such forfeiture for failure to do sixty shifts of work per month on said mining claims, thirty days is given

for the Lessee to remove all ores and property belonging to him, mined or being on said claims, and all ores or other property found remaining on said mining claims, thirty days from the date of any such forfeiture, shall be and become the property of the Company. And upon any failure to make any payment of the purchase price of said mining claims and property as herein provided, the party of the first part shall have the right of immediate possession of said mining claims and property, and the right to gain such possession, with or without process of law. All agreements or leases heretofore existing between said parties, are hereby cancelled and annulled.

IN WITNESS WHEREOF, the parties hereto, the said first and second parties, have hereunto caused the same to be executed, the said party of the first part, by its Attorney-in-fact duly constituted and appointed, and the party of the second part, individually, in his own proper handwriting.

LE CHAMP D'OR FRENCH GOLD MINING CO., LIMITED,

Party of the First Part.

By E. CARTER EDWARDS,

Its Attorney-in-fact. [159]

J. W. DUNFEE,

Party of the Second Part.

Witnesses:

G. W. THOMPSON.

BERT HUFFSMITH.

SCHEDULE No. L ANNEXED TO LEASE
DATED JANUARY FIRST, 1921.

STOCK OF MACHINERY & SUPPLIES AT
ORLEAN MINES.

- 1 #400 Champion forge blower.
- 1 Blacksmith vice.
- 1 Large Anvil.
- 2 Mine Trucks.
- 1 Jack-screw.
- 2 Windlass Drums.
- 75 feet *ft.* $\frac{1}{2}$ inch steel cable.
- 3 Windlass Buckets.
- 2 Whims.
- 1 Adze.
- 2 Saws.
- 1 Steel Square.
- 5 Shovels.
- 7 Picks.
- 1 Claw Hammer.
- 300 lbs. $\frac{7}{8}$ inch drill steel.
- 75 lbs. $\frac{5}{8}$ inch drill steel.
- 4 Single Jack drill hammers, (4).
- 1 Ore Screen (about 3' 6" x 5') & 1 ore sacking funnel.
- 1 Pair Blacksmith tongs.
- 1 Drill Sharpening Hammer.
- 1 Ball Pointed Hammer.
- 1 Eight (8) inch Monkey-wrench.
- 1 Fourteen inches pipe wrench.
- 3 Small Mortars.

400 ft. Air Pipe.

1 #417 Western gas engine 25 H. P. with self-tipping car, rope, etc., in good going order.

Rails and fittings in main Shaft and Drifts.

1 Building known as Hotel.

(The house now leased to Mr. J. Martin, afterward sold to Tim Conolly, is not included in this Schedule.)

Signed by:

LE CHAMP D'OR FRENCH GOLD MINING CO., LIMITED.

By Its Attorney-in-fact:

E. CARTER EDWARDS,

The Company.

J. W. DUNFEE,

Lessee.

Witness:

JOHN CARTER.

TESTIMONY OF MRS. C. A. TERWILLIGER,
FOR PLAINTIFF.

Mrs. C. A. TERWILLIGER, called as a witness on behalf of plaintiff, duly sworn, testified as follows:

Direct Examination by Mr. STODDARD. [160]

I am the wife of plaintiff and have been such during all of the times mentioned in this case. I accompanied my husband to Goldfield and Hornsilver in the latter part of July and the early part of August of the year 1918. I was present at a time on that trip when conversations took place between

(Testimony of Mrs. C. A. Terwilliger.)

Mr. Edwards or Mr. Dunfee, or both of them, and Mr. Terwilliger. The first conversation took place in the office of Mr. Edwards in Goldfield the evening either of the 31st of July, 1918, or the 1st day of August, 1918. Mr. Edwards, Mr. Terwilliger and myself were present.

(Q.) What, if anything, was said referring to the mining operations or to mining properties?

Mr. TILDEN.—Objected to on the ground defendant Dunfee was not present, and no such connection is shown between him and Carter Edwards as would bind him by anything that was said. The same objection that was made previously, and your Honor took the testimony provisionally.

Mr. STODDARD.—Your Honor will recall that Mr. Edwards is one of the defendants in this action, that he is also secretary of the company, and likewise attorney-in-fact for the French Company, so any statements Mr. Edwards may have made relative to the issues of this case, or as to extensions, or any other matters involved in the issues of this case, I think would be material.

The COURT.—As long as Mr. Edwards is a defendant I do not very well see how I can refuse to admit this testimony.

Mr. TILDEN.—He is a mere formal defendant; he is a defendant merely by virtue of his being a director of the company on behalf of which the action is brought. He is made a defendant to comply with the rule of pleadings that when a dissenting stockholder begins a suit, he should make defend-

(Testimony of Mrs. C. A. Terwilliger.)

ants those directors to whom he had unsuccessfully appealed to take action on behalf of the corporation in its own name. He is not affected by this [161] action in the slightest degree.

The COURT.—Well, the testimony will be admitted subject to your objection made in behalf of Mr. Dunfee; I don't understand you make it any further?

Mr. TILDEN.—No, that is all.

The COURT.—Proceed.

Mr. STODDARD.—Do you remember the question, Mrs. Terwilliger?

(A.) The conversation as near as I can recall it?

(Q.) That is the question, yes.

(A.) The conversation between Mr. Terwilliger and Mr. E. Carter Edwards was at first a general conversation, along the line of the work that had been going on in the Orleans property, and they spoke about the conditions of the war, and the high cost of operating, and the high cost of working, and the fact that the company had been operating for many months under these conditions, and there was no profit to the company; and Mr. Terwilliger and Mr. Edwards both agreed that it seemed unwise to proceed with the work under the present war conditions; and they spoke about the large amount of development work the Orleans Company had done *since* beginning operations, and Mr. Edwards stated that the amount of excess work that the Orleans Company had done more than that required by the lease would apply on future extensions of

(Testimony of Mrs. C. A. Terwilliger.)

the lease; and he also stated that he had received from the owning company in Paris, advice to extend the lease on the Orleans property for another year, up to June 1st, 1920, and that would be done.

The COURT.—To June, 1920?

(A.) The lease would be extended, I believe to June 1st, 1920; that was told in connection with the closing down of the property during the war conditions. He also said that he wanted to make out a report for Mr. Terwilliger to take back to Imperial Valley to the stockholders, and he would make that out so we could get it [162] the next day.

Mr. STODDARD.—Is that all you recall that took place at that particular conversation, Mrs. Terwilliger?

(A.) Well, in speaking about closing down the mine, I recall that he said Mr. Dunfee was then at work on a certain work in the mine that he was desirous of completing before he closed down the property; that he thought as soon as that was finished he would shut down; and he spoke about going to Hornsilver with us the next day, as he was going over there on business.

(Q.) Were there any further conversations between Mr. Edwards and Mr. Terwilliger in your presence in Goldfield at that particular time, or this time?

(A.) Yes, sir, the next day, which I believe was August 1st, 1918, if it was the 31st of July the day we arrived there, on the morning I will say of August 1st, 1918, Mr. Terwilliger and I called at

(Testimony of Mrs. C. A. Terwilliger.)

Mr. Carter Edwards' office, and he had a report ready that he had prepared for the stockholders; he read it to us, and when he had finished he said, "How does that sound to you, is that all right? If it is not strong enough I will make it stronger," and Mr. Terwilliger replied that it sounded all right to him. That was about all; we then left and went to the Goldfield Hotel.

The WITNESS.—(Continuing.) That was all that occurred at that particular conversation. On the next day I went to Hornsilver; the same day that Mr. Edwards read us the report we went to the Goldfield Hotel, and I there met Mr. J. W. Dunfee. (Witness identifies Plaintiff's Exhibit No. 3 as said report.) Mr. Terwilliger was present and a conversation took place between him and Mr. Dunfee—just a casual conversation. All that was said about the mine at that time was that Mr. Dunfee had had a difficult time owing to war conditions, in operating; he talked most all about his own condition, and his teeth aching, and neuritis, and the trouble that he had had physically. The next day I went to Hornsilver by automobile. [163] Present in the machine were Mr. Edwards, Mr. Terwilliger and myself. We reached Hornsilver the same day. I believe that was August 3, 1918. Mr. Dunfee was there when we arrived. A conversation was had when we first arrived at Hornsilver, at the office of Mr. Dunfee. Mr. Edwards was not present; he had gone to another section of the country in the interests of his election, but Mr. Dunfee, Mr. Terwilliger

(Testimony of Mrs. C. A. Terwilliger.)
and I met at Mr. Dunfee's office at that time. There was a general talk had at that time about the mine and the work; we walked up to the shaft and around on the surface, and Mr. Dunfee explained quite a good deal about the workings to Mr. Terwilliger but I didn't understand particularly, and about the work that he had been doing recently. Mr. Dunfee represented, or said in substance, as Mr. Edwards had said, that he was on a certain work that he expected to finish, and he said, too, that he hoped that he would open up some good ore on that work, and when that was completed he expected to close down the mine. He stated his reasons that the mine should be closed down, to wit, on the high cost of mining and milling, and on account of the depleted treasury of the company. I believe that the report that had been read to me and Mr. Terwilliger the day before was taken to Mr. Dunfee, and signed at his office, that he signed the original; there were several copies made, one for each, or nearly one for each stockholder. I again saw Mr. Edwards before I left Hornsilver and a conversation was then had relative to the property.

(Q.) Relate what that was.

(A.) We were leaving for California—

Mr. TILDEN.—(Interrupting.) Same objection.

The COURT.—It will be the same ruling.

(A.) Mr. Edwards, I will state, first came to Mr. Dunfee's office, or the office of the company, a

(Testimony of Mrs. C. A. Terwilliger.)

very short time before we left, and as we were in the machine and bidding each other good-by, Mr. Edwards said, "Now, Mr. Terwilliger, you go [164] down to Imperial Valley and tell the stockholders not to worry about their investment, that their interest will be protected in every way."

The COURT.—Was Mr. Dunfee present?

(A.) Yes, sir, I think he was; I think he was right there. We went away feeling very much relieved.

The WITNESS.—(Continuing.) Immediately prior to our leaving, or possibly while we were going up on the property, or at the office, Mr. Dunfee assured Mr. Terwilliger that if—this was about the substance of it—that if matters were left to him we would all make some money, or words to that effect, that he and Mr. Terwilliger would make a good thing out of that Orleans property, that he would do his best, and he would consider that they had a good property there.

(Q.) At the time of this trip that you saw Mr. Dunfee and Mr. Terwilliger together conversing, what did their attitude seem to be, friendly or otherwise? (A.) At the property?

(Q.) During all of this trip, both at Goldfield and at the property?

(A.) Yes; it was a little strained at first on the part of Mr. Dunfee, as he seemed to realize that he owed Mr. Terwilliger an apology or an explanation, and he did make an explanation, and they talked over their differences, and Mr. Terwilliger readily

(Testimony of Mrs. C. A. Terwilliger.)

accepted his explanation, and thereafter everything was affable. At the time of our departure when good-bys were said everything was unusually affable and pleasant and Mr. Edwards in particular was in a very jovial mood. I met Mr. Dunfee first at the Munn Hotel in Los Angeles a few days prior to September 2, 1916, from which date on up to the present time I saw very little of him. At all times when I saw him and Mr. Terwilliger together they were friendly except this time in Goldfield, there [165] was a little coolness there, but that was explained away. The memorandum in pencil on the back of the second page of the letter dated March 26th, 1920, Plaintiff's Exhibit No. 4, from Mr. Dunfee to Mr. Terwilliger, is in my handwriting. I cannot tell the exact date when that was placed upon that letter, but it was some time in the summer of 1922. I think I was in Los Angeles at the time.

(Q.) What was your purpose in writing that endorsement or statement?

(A.) I had been gathering up letters from Mr. Dunfee in connection with this case, and making out memoranda or record of same and the reply to this letter was missing, but I remembered Mr. Terwilliger dictating a letter in reply to this a short time after he received it, and of my writing it, and in the absence of the correct copy that I wrote, we discussed it, and I recalled this was the substance of the letter, and so I put that memorandum there for the use of the attorney, not as an exact copy of the

(Testimony of Mrs. C. A. Terwilliger.)

letter I sent, but as the substance of that letter; and not as the exact date, but as near as I could recall it I put it down. (Witness is shown and she reads letter dated May 2, 1920, set forth in defendant Dunfee's answer in this case.)

Mr. STODDARD.—I will hand you the original, a copy of which is pleaded in the answer, and ask you to state if that is the letter a summary of which you gave according to your recollection, in the pencil endorsement on the March 26th letter.

(A.) Yes, sir, that is the correct reply as near as I can recall it.

(Q.) And the endorsement which appears on Mr. Dunfee's letter to which this is a reply, was your best recollection at the time you made it of the contents of this one? (A.) Yes, sir.

Mr. STODDARD.—We will offer this letter in evidence, your Honor. [166]

Mr. TILDEN.—No objection.

Mr. STODDARD.—You may cross-examine.

(The letter is marked Plaintiff's Exhibit No. 12 and reads as follows:)

PLAINTIFF'S EXHIBIT No. 12.

4419 Finley Ave., Los Angeles, Cal.

May 2, 1920.

J. W. Dunfee,

Goldfield, Nev.

Friend Will:—

Your letter of some time ago received and I have been away, hence delayed in replying to same.

(Testimony of Mrs. C. A. Terwilliger.)

When will you be in Los Angeles to confer with me regarding this matter of the Orleans property. I would not attempt to do any business through the mail, as I consider it would be time wasted. I expect to be here from now on. Very glad to hear your health is so much improved.

Yours very truly,

C. A. TERWILLIGER.

Cross-examination by Mr. TILDEN.

My purpose in going to Hornsilver was seeing Mr. Edwards and Mr. Dunfee and knowing something of the condition of the property. I was personally acquainted with all of the stockholders in Imperial Valley, and very often they talked with me about their investment in Hornsilver and also about the company with my husband there. I was anxious to see the Orleans property and Mr. Terwilliger was very anxious to see Mr. Dunfee and Mr. Edwards and the property. He and I discussed the purpose many times before we went. It did not consist merely in a desire to converse with Mr. Edwards and Mr. Dunfee. It consists in a desire to know first-hand information, and to ascertain the exact condition as near as he could find it, by a personal visit thereto. He paid all his own expenses and all of mine, so there was nothing that the company was indebted to us; we knew that the treasury [167] was low at the time, and we would have to pay our own expenses, and every dollar was paid by Mr. Terwilliger. I did not go down in the mine on that trip. I am quite positive that Mr. Ter-

(Testimony of Mrs. C. A. Terwilliger.)

williger did not go down in the mine. The underground workings we saw nothing of. We saw the dumps and the machinery and the mill and the men employed. Mr. Dunfee told me about the work. I inquired about the books, and expected to look them over—the books of the company—but did not do so; they were not available. There was no regular set of mining books kept. I asked to see the books and I am familiar with mining books; I have kept a good many sets myself; and there was nothing such as I had been accustomed to seeing or keeping. I saw a great many receipts, bills and cancelled checks on spindles, but nothing that I could get intelligence to glance over and see as you would in a company that is systematically keeping their books. I saw the evidence that would be embodied in books. I did not go there particularly to see that evidence.

(Q.) You didn't go there for the purpose of going down in the mine, and you didn't go there for the purpose of particularly *of* seeing the books, did you? (A.) Not exclusively.

(Q.) Well, what did you go for?

(A.) I went with Mr. Terwilliger to get first-hand knowledge so I could talk intelligently to the stockholders that inquired of me, and also for the satisfaction of seeing the property myself.

(Q.) Seeing the surface of it?

(A.) Yes, and hearing first-hand information from Mr. Edwards and Mr. Dunfee.

(Q.) Didn't you go there to see Mr. Dunfee?

(Testimony of Mrs. C. A. Terwilliger.)

(A.) Partially, yes.

(Q.) And talk to him, and get him to sign the August [168] 1st report?

(A.) No, sir; I didn't know that report was to be made out when we went there.

(Q.) After the report was made out wasn't that your purpose in going to Hornsilver, to get Mr. Dunfee to sign it?

(A.) No, sir, because he could have sent that by mail.

(Q.) Why could not he have signed it at the Goldfield Hotel?

(A.) The report wasn't there; the report was in Mr. Dunfee's office. Mr. Dunfee didn't come to the hotel with the report, and Mr. Dunfee was only there a short time; he was in a hurry and went back to the property.

(Q.) Isn't it a fact that you and Mr. Terwilliger came to Goldfield to get that extension?

(A.) No, sir.

(Q.) And you had it set forth in that report, and Mr. Terwilliger and Mr. Edwards signed it, and then you took it down to Mr. Dunfee to be signed, and Mr. Dunfee made some objections to it, and finally signed it; that is all there was to it, wasn't it?

(A.) I don't know that Mr. Dunfee made any objections to it before he signed it.

(Q.) Well, you don't know everything that happened there, do you? (A.) I was right there.

(Testimony of Mrs. C. A. Terwilliger.)

(Q.) Why don't you know that he made some objections?

(A.) I don't recall that he made any objections to that report; I don't recall that he did. I know it was signed, and Mr. Terwilliger signed one copy.

(Q.) You and Mr. Terwilliger advise with one another in business matters, don't you?

(A.) Yes, sir.

(Q.) I mean rather more extensively than husband and [169] wife ordinarily do?

(A.) Well, I have been a business woman for a number of years. I understand more than some women that haven't had my business experience.

TESTIMONY OF E. CARTER EDWARDS, FOR PLAINTIFF.

E. CARTER EDWARDS, called as a witness for plaintiff, and being duly sworn, testifies as follows:

Direct Examination by Mr. STODDARD.

I am the Edwards referred to as the attorney-in-fact of what we have designated as the French Company. I am an attorney practicing in Goldfield and have practiced there fifteen years or a little more. I know Mr. Dunfee and have known him *tell* or twelve years. The relation of attorney and client does not exist between me and him except as I am related to him in this leasing matter. That is, I have drawn papers, and incidentally when he had no counsel, given him advise which he

(Testimony of E. Carter Edwards.)

was willing to accept, without any employment at all. I am also secretary of the Orleans Mining and Milling Company.

(Q.) How long have you been such secretary?

(A.) Well, when they organized their company in California Mr. Terwilliger and Mr. Dunfee, so they informed me—I wasn't present, and could not say first hand,—Mr. Dunfee after the organization approached me, and said he wanted me to be a director so I could be secretary, which I didn't want to be in such a proposition, and I told him I was attorney-in-fact for the Champ d'Or or French Company, and I thought the two positions would be inconsistent.

The WITNESS.—(Continuing.) That was about the middle of January, 1917, and I have not at any time since then been removed as secretary. As secretary I have the books and records of the company, the corporate records. These are the Imperial Valley stockholders, Leslie Smith, 1,000 shares, Mrs. Jennie [170] Robinson, 2,000 shares, George J. Shank, four thousand shares, Albert Lackman, 6,000 shares, T. B. Shank, 4,000 shares, J. T. Taecker, 6,000 shares, H. P. Fites, 2,000 shares, George I. Droffmeyer, 6,000 shares, C. A. Terwilliger, 1,000 shares, evidently being for Melville W. Curns; then, of course, Mr. Terwilliger and Mr. Dunfee are the large stockholders. 300,000 shares stand in the name of Mr. Dunfee. I am the holder of about a thousand, about a thousand and one shares, something of that kind. 267,000

(Testimony of E. Carter Edwards.)

shares stand in the name of plaintiff, C. A. Terwilliger. John Winkler is a stockholder, 200 shares standing in his name. The total issue at this time is 1,000,000 shares, the whole capitalization; the treasury contains 400,000; of this 200 was issued to Mr. Winkler. That would make the total outstanding stock 600,200. The directors of the Orleans Mining and Milling Company are Mr. Dunfee, Mr. Charles Ellsworth, who is deceased, myself and Mr. Stoddard. All of these persons named have been directors since the organization of the company except myself and Mr. Ellsworth who were put in afterwards. I was put in as director on January 15, 1917. Mr. Ellsworth died last year; I would not like to give the exact date—I think some time during the year 1921. The officers of the company are J. W. Dunfee, president and general manager; C. A. Terwilliger, vice-president; myself, secretary, and I think Mr. Dunfee acted as treasurer too; he had charge of the funds. I think all of these parties named have been officers since January 15, 1917, and are such at the present time. Referring to the 600,200 shares issued, there has been no change since this action was commenced. I have been attorney for the French Company since September, 1915, just the date in September I don't remember.

Witness identifies his power of attorney and the same is admitted in evidence without objection, marked Plaintiff's [171] Exhibit No. 13, and reads as follows:

PLAINTIFF'S EXHIBIT No. 13.

“KNOW ALL MEN BY THESE PRESENTS: That Le Champ D’Or French Gold Mining Company, Limited, a corporation, does, by these presents, constitute and appoint E. Carter Edwards its lawful attorney, for it and in its name, place, and stead, to receive all moneys due on royalties to said Company, from the Leases of the property of said company situated at Hornsilver, Esmeralda County, Nevada, known as the Orleans Group of Mines and the mines at Tokop, in said county, and State, known as the Tokop group of mines, now occupied and being operated under Leases with said company by W. J. Dunfee, and Nicholas Theo, respectively, and to settle and adjust all questions for said company that may, can or does arise out of or by reason of said leases, with the respective parties aforesaid thereto, including the appointment for said company of arbitrators, if the same shall become necessary, under the terms of said leases, and also, in case one or both of said leases shall end and determine by reason of a violation or nonfulfillment of the terms and conditions thereof, to make other leases for the leasing to other person or persons said properties, to wit: Said Orleans, or Tokop properties. A full description of said Orleans and Tokop Group of mines, is set forth and described in said leases to Dunfee and Theo, aforesaid, reference to which is hereby made. And to manage *it* business and affairs and represent it in

all matters of or concerning the Silver King Mining Company and its stock.

Giving and granting unto our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully and to all intents and purposes as it might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that its said attorney of his substitute shall lawfully do or cause to be done, by virtue [172] of these presents.

IN WITNESS WHEREOF, the said Le Champ d'Or French Gold Mining Company, Limited, has executed and delivered this Instrument by its attorney-in-fact, duly made, constituted and appointed therefor, dated the 29th day of July, 1915.

LE CHAMP D'OR FRENCH GOLD MINING COMPANY, LIMITED, a Corporation.

By J. P. CHARRA,
Its Attorney-in-fact.

State of Nevada,
County of Esmeralda,—ss.

Before me, Adams Franklin Brown, a notary public in and for said County and State, duly appointed, qualified, and acting, personally appeared Le Champ d'Or French Gold Mining Company, Limited, a corporation, by its attorney-in-fact Jean Pierre Charra, to me known to be the individual described in and who executed the foregoing power of attorney for and on behalf of the said Le Champ

(Testimony of E. Carter Edwards.)

d'Or French Gold Mining Company, Limited, and the said Charra acknowledged to me that he executed the same on this the 29th day of July, 1915, freely and voluntarily, and for the uses and purposes herein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and Official Seal at my office in Goldfield, Esmeralda County, Nevada, on the 29th day of July, 1915.

[Seal] ADAMS F. BROWN,
Notary Public in and for Said County and State.

My Commission expires the fourth day of Feb., 1917.

(Cancelled Revenue Stamp for 25¢.)

[Endorsed]: Power of Attorney from Le Champ d'Or French Gold Mining Company, Limited, a Corp., to E. Carter Edwards. Dated July 29th, 1915. 13032. Filed for record at the request of E. Carter Edwards February 4, 1918, at 30 minutes past 1 o'clock P. M. [173] and Recorded in Book 10 of Powers of Atty., Page 58, Records of Esmeralda County, Nevada. Clyde P. Johnson, County Recorder. W. Deputy. Compared. Indexed."

The WITNESS.—(Continuing.) The property mentioned in the power of attorney, Plaintiff's Exhibit "13," called the Tokop property, is about nine miles from the Orleans property. Mr. Dunfee was the lessee on the Orleans property in 1915. By Orleans property I refer, and this power of attorney refers, to the Orleans Group mentioned in

(Testimony of E. Carter Edwards.)

the pleadings in this case. Mr. Dunfee continued to be a lessee of the property until he assigned his lease to the Orleans Mining and Milling Company. He did that with the consent of the French Company. Referring to the writing across the face of the lease of June 5, 1920, Plaintiff's Exhibit No. 11 (reading), "cancelled January 1st, 1921," and signed by E. Carter Edwards, attorney-in-fact, and J. W. Dunfee, that writing was placed on there on the date it bears. That is my signature; that lease was delivered for cancellation in the fall but actually cancelled at that date. The lease dated January 1, 1921, Defendant's Exhibit "J," was given subsequently to this cancellation; that is my memory. The cancellation of the one lease and the giving of the other was at the same time. I wish to state that the lease was really made subsequently but dated back; we had a kind of oral agreement that I would give Mr. Dunfee a lease on the terms of that lease, and when he struck the ore, I dated back to the time I made the oral lease. I am referring to the lease dated January 1, 1921. I prepared the leases. The oral lease was in effect from the time that the oral agreement was made, about the 1st of January, 1921, up to the time that Mr. Dunfee struck ore, which was about the 1st of March; now, I would not be accurate, but about that time—the same year. Mr. Dunfee had possession of the property and was working it during that time with my permission. [174] He has been in and upon that property and in possession of it

(Testimony of E. Carter Edwards.)

from the year 1915 up to the present time, except during the time that the Orleans Mining and Milling Company was in control, and from the time he surrendered this lease for cancellation (referring to June 5, 1920, lease) until I made this lease (referring to January 1, 1921 lease), in which interim you might say the property was vacant. Under that oral agreement Mr. Dunfee had permission of the French Company to go upon the property and work it if he desired to—oral agreement to the same effect as the written, put in writing when the time came, and Mr. Dunfee asked for it. I acquired my 1,001 shares of stock when they gave me some stock to qualify me as a director. I did not ask for it. It was given me by Mr. Dunfee and Mr. Terwilliger. I am not so sure of Mr. Terwilliger being present when it was given. I think the stock has never been delivered to me; it is still in the book and signed, and the book is in my possession. I do not think that is a part of the Dunfee stock; I can look at the book and say. (Book handed witness and after examination of same he continues:) I have looked the matter up, and I find one certificate for one share to E. Carter Edwards, and another for a thousand shares to E. Carter Edwards; the one for the thousand is from the treasury, so I would like to correct my testimony to that extent, that that much was taken from the treasury. The one share was transferred to me from N. A. Pickett, formerly a director and was issued before there was any treasury stock.

(Testimony of E. Carter Edwards.)

It is certificate No. 69, dated September 20, 1916, signed J. W. Dunfee, president, and E. Carter Edwards, secretary. Certificate 69 was issued to Pickett; my certificate is number 73, both of date of September 20, 1916, and both signed by Dunfee as president and Edwards as secretary. As to my testimony to the effect that I became secretary in January, 1915,—I would like to correct that; they wanted me to be secretary soon after they organized. I would not like to say the date [175] because I could not say the exact date, but Mr. Terwilliger was selling stock in Imperial Valley; it was necessary to deliver that stock down there in order to get money, and Mr. Dunfee insisted after the organization that I should be secretary. I should therefore say that I was secretary *that I was secretary* earlier than January, 1917; they came up there and ratified what I had done before by appointing me. I have no doubt I was secretary on September, 1916; I have no doubt Mr. Dunfee came up there and had me act. Referring to the certificate of stock standing in the name of Mr. Ellsworth, which represented 250 shares and was issued from the treasury—that was certificate numbered 17, dated September 20, 1916. I suppose it is signed in the same manner as the rest.

Cross-examination by Mr. TILDEN.

I counseled with Mr. Terwilliger as well as Mr. Dunfee. I never showed the least preference between them. I never gave them to understand that I would act in hostility to my power of attorney

(Testimony of E. Carter Edwards.)

from the French Company or my fidelity to the French Company; I would act for the French Company at all times. I performed my last act as a director or an officer of the Leasing Company on November 11, 1918. That company never functioned in any way after that to my knowledge. November 11, 1918, was my last act for the Orleans company. There was nobody on the property from October 10, 1918, until May 31, 1920. The next person to go on there after that date was Mr. Dunfee, when I gave him the lease or after I gave him the lease of June 5, 1920. He stayed in actual physical possession and presence on the property in the month of June and July and the early part of August. He was then broke, and spent his money and quit working the property. He left the property. He remained off the property until he went back after the 1st of January, 1921. He was in physical possession of the property after that date under first the oral agreement or [176] contract, and secondly, under the lease dated January 1st, 1921. The oral agreement lasting until about the 1st of March.

Redirect Examination by Mr. STODDARD.

The Orleans Mining and Milling Company has never been dissolved as a corporation. Its office has been in my office in Goldfield and that is the office of the company now and has been at all times since it started in business in this state. I have custody of all of its books and have them in my office in Goldfield or here in the courtroom.

TESTIMONY OF A. R. D'ARCY, FOR PLAINTIFF.

A. R. D'ARCY, called as witness for plaintiff, sworn, testified as follows:

Direct Examination by Mr. STODDARD.

I reside in Goldfield, Nevada. I know a corporation known as the Hornsilver Orleans Mining Company and its president. I have been its president since it was organized which was July 22, 1922. I know Mr. Dunfee, one of the defendants in this case. I had a transaction with him with reference to the Orleans group of mining claims at Hornsilver. I purchased a lease and option from him; the date of the agreement between him and me was July 18, 1922. I am familiar with the lease dated January 1, 1921, marked Defendant's Exhibit "J" in this case.

(Q.) Was the transaction that you had with Mr. Dunfee with reference to his lease?

Mr. TILDEN.—This is objected to on the ground the cause of action relates to a certain lease made in the month of June, 1920; this is not the lease; this is a lease made months afterwards, and there is neither pleading nor proof to connect the lease in question with the lease pleaded.

Mr. STODDARD.—There may be, if the Court please, a variance in this proof, and it may be necessary for us to amend [177] our complaint to conform to the facts; I realize that.

Mr. TILDEN.—Well, that would not help, because there is nothing to bridge the gap between these two transactions. I want to elaborate that point a little in my motion to dismiss. This complaint is rather a difficult complaint to construe, and it seems to be based partly on allegations of fraud and partly upon a contract. I don't like to go into it very fully now.

The COURT.—Well, I will overrule your objection at this time and allow the question, and the testimony will go in subject to your objection; if you don't care to argue it now, I don't care to decide it now.

Mr. TILDEN.—Well, I would like to have it go in subject to an objection which will be covered by my motion to dismiss, otherwise I will have to argue my objection now.

The COURT.—I think it may just as well go in; it will go in anyway as part of the record, either with the order that it is not admissible or with the order that it is.

Mr. TILDEN.—Well, I will make this objection at this time; it is a little too general in its nature, but it may cover the ground, namely, that the contract pleaded on calls for extensions or purchases thereto belonging; I will read the whole paragraph so that the meaning of "Thereto belonging" will be clear: (Reads:) "In consideration of the party of the first part giving to the party of the second part a fifty per cent interest in and to the Orleans

Development Mining & Milling Company, consisting of a lease on the following five claims"—naming the claims—"together with all other extensions or purchases thereto belonging," evidently meaning belonging to said lease, "said second party agrees to raise," and so forth. There is no proof that this is an extension of the lease mentioned in this contract; in fact, upon its face it purports to be a totally new lease; there is no fact alleged and no fact introduced, why your Honor should disregard the legal [178] aspect of it as a totally new lease, and give it an aspect that it does not bear, to wit, an extension. That is one objection. The other objection goes to the allegations of fraud. Your Honor will notice that these allegations are of two kinds, fraudulent representations and fraudulent concealment; and before I read this I call your Honor's attention at the beginning to the fact that these are not allegations of false representations, as understood by the rules of pleading with respect to this branch of fraud, nor with respect to the rules that measure the sufficiency of such allegations to constitute a cause of action; in other words, they are allegations that are promissory wholly in their nature. I call your Honor's attention to that so you will notice it as I read. I will also call your Honor's attention to the fact that they are conditional, that is, that their operation is conditional, the condition being two-fold; first, that one of the parties interested shall express his desire that they shall operate; second,

(Testimony of A. R. D'Arcy.)

that a necessity for their operation shall arise, and that there is no proof in this case that any such desire was ever expressed, or that any such necessity ever arose.

I have made that as clear as I would like in elaborating the motion to dismiss, but those points cover the objection I have to your Honor's hearing this testimony from Mr. D'Arcy.

The COURT.—I will overrule the objection, and the testimony will go in subject to a motion to strike it out.

Mr. TILDEN.—Will your Honor allow me an exception at this time, so I will not have to make the motion to strike?

The COURT.—Yes, you may have your exception now.

The WITNESS.—(Continuing.) The transaction I had with Mr. Dunfee was with reference to his lease, Defendant's Exhibit "J." I entered into an agreement with him to purchase all rights secured by him in that lease. When I say I did, I do not mean our Company, but that I did it personally at that time. That was in writing. [179]

Mr. TILDEN.—My objection covers all of this, does it, your Honor, so I need not renew it?

The COURT.—Certainly, this whole matter. As I understand it, he can give any testimony with reference to this agreement, that is not subject to the objection that is made; the objection is to the agreement, it is an objection to all the testimony with reference to this transaction.

(Testimony of A. R. D'Arcy.)

Mr. FRENCH.—I so understand it.

The WITNESS.—(Continuing.) I have a copy of that agreement with me (hands same to counsel). This agreement was dated July 18th, 1921. We didn't get our charter for the Orleans Hornsilver Mining Company until after the agreement was entered into, that is, as I recollect it, July 22d, 1921, is the date of our charter. After the Orleans Hornsilver Mining Company obtained its charter, we proceeded right from the time that agreement was entered into; I, individually, and then afterwards the Orleans Hornsilver Mining Company, proceeded along the lines of that agreement. The lease, Defendant's Exhibit "J," was never assigned by Mr. Dunfee to the Orleans Hornsilver Mining Company or to me. This agreement was referred to, or at least this lease and option is referred to in that agreement, and under that I am to receive all the rights and benefits of that lease and option; and I in turn assign the agreement dated July 18, 1921, to the Orleans Hornsilver Mining Company. The consideration we gave to Mr. Dunfee was \$15,000.00 paid on the 18th day of July, 1921. I made that individually. On the 3d of January, 1922, there was a payment of \$4,028.33 made to Mr. Dunfee, paid to his credit into the John S. Cook Bank in Goldfield, which held the escrow papers. That was made by me as a loan to the company; that was made by my individual check. Additional consideration for the agreement last mentioned was 150,000 shares of the stock of the

(Testimony of A. R. D'Arcy.)

Orleans Hornsilver [180] Mining Company issued and delivered to Mr. Dunfee in the latter part of July, 1921. The Orleans Hornsilver Mining Company now owes Mr. Dunfee \$20,000.00 on account of this contract. At the present time that is the form of notes; we have given the Company's note for \$20,000.00, due June 1, 1923. It was shortly after July 18, 1921, that I went upon the Orleans group of claims, took charge of the work there, and commenced operating. I had been upon the ground before that. I had been more or less familiar since along in 1916. I examined the property before I purchased it. The last examination I made was along about April, visits made from time to time along about the first of April until July 18th, 1921; Mr. Dunfee was on the ground when I was making my examinations.

(The agreement between Dunfee and D'Arcy, marked Plaintiff's Exhibit No. 14, is admitted in evidence without objection and is as follows:)
[181]

PLAINTIFF'S EXHIBIT No. 14.

WHEREAS, J. W. DUNFEE, is the Lessee, and LE CHAMP d'OR FRENCH GOLD MINING COMPANY, LIMITED, is the Lessor in that certain Lease and Option dated the first day of January, 1921;

And WHEREAS, A. I. D'ARCY is desirous of purchasing all the right, title and interest of said J. W. Dunfee in said Lease and Option, and thereby

acquire title to the mining claims and mining property in said Lease and Option described, in A. I. D'Arcy, Trustee, in like manner as J. W. Dunfee is entitled under said Lease and Option to acquire title therein;

NOW THIS AGREEMENT, made and entered into this the 18th day of July, 1921, by and between J. W. DUNFEE, of Hornsilver, Nevada, the party of the first part, and A. I. D'ARCY, of Goldfield, Esmeralda County, Nevada, the party of the second part, consented to and approved by E. Carter Edwards, Attorney in Fact for Le Champ d'Or French Gold Mining Company, Limited:

WITNESSETH:

That for and in consideration of the payment by the party of the second part to the party of the first part of the sum of Forty Thousand Dollars (\$40,000.00) in the manner hereinafter provided, and the delivery to the said party of the first part by the Company to be organized by the party of the second part which shall hereafter operate and develop the mining claims and mining property, of 150,000 shares of the promotion stock of said company in 1000 share certificates or in such convenient amounts as the party of the first part shall order, the said Company to have capital stock in an amount not to exceed 1,500,000 shares, the party of the first part hereby agrees to assign, sell, transfer, and convey to the party of the second part, all the right, title, interest, property claim or demand

whatever, of the party of the first part, of, in, or to, that certain Lease and Option aforesaid dated the 1st day of January, 1921, made by Le Champ d'Or French Gold Mining Company, Limited, Lessor, to J. W. Dunfee, Lessee. Said Lease and Option is hereby referred to and made a part hereof.

The manner of payment of said Forty Thousand Dollars (\$40,000.00) to said J. W. Dunfee, shall be as follows, to wit: Fifteen Thousand Dollars (\$15,000.00) the first payment thereof, shall be paid to J. W. Dunfee the party of the first part by the party of the second part, in cash, on the date of the delivery of a deed duly executed by Le Champ d'Or French Gold Mining Company, Limited, grantor, to A. I. D'Arcy, trustee and grantee, conveying title of, in and to, the mining claims and mining property in said Lease and Option described and intended to be sold shall be deposited in the Bank of John S. Cook & Company, at Goldfield, Nevada, with escrow instructions directing the manner and dates of making payments to J. W. Dunfee and to Le Champ d'Or French Gold Mining Company, Limited, for their respective interests in said mining claims and mining property herein intended to be sold, and that pending the time that shall be used in making and delivering such deed in escrow as aforesaid the said \$15,000.00 cash payment, to J. W. Dunfee shall be deposited in the Bank of John S. Cook & Company to the credit, and for the sole use and benefit of said J. W. Dunfee, and to be paid to said J. W.

Dunfee immediately by the said Bank of John S. Cook & Company, upon the deposit of said deed and escrow instructions as aforesaid, as and for said first payment of \$15,000.00; Fifteen Thousand Dollars (\$15,000.00) in [182] cash, six (6) months from the date hereof, that is to say on the 18th day of January, 1922, as the second payment thereof; and the balance, to wit, the sum of Ten Thousand Dollars (\$10,000.00) twelve (12) months from the date hereof; that is to say on the 18th day of July, 1922, as the third and last payment thereof.

The party of the second part expressly assumes and agrees to pay Le Champ d'Or French Gold Mining Company, Limited, for the mining claims and mining property and fixtures thereto attached and thereon situated used in the operation of said Lease and Option, the purchase price in said Lease and Option provided, to wit: the sum of Forty Thousand Dollars (\$40,000.00) in the manner, and upon the payments, and terms therein provided, or to anticipate said payments and pay off the whole or any greater part of said purchase price by paying the payments in said Option provided at such earlier dates as the party of the second part shall choose to make them, and upon making fully payment for said mining claims and mining property, property, and fixtures, the Deed in Escrow as aforesaid, shall be delivered by the Escrow Holder, to the party of the second part conveying title as aforesaid of, in, and to said mining claims and mining property, property and fixtures to the party of

the second part as trustee, said mining claims are described as follows, to wit: Orlean No. One (1), Orlean No. Two (2), Orlean No. Three (3), Orlean Extension, and Orlean Extension No. One (1), situated in Hornsilver Mining District, Esmeralda County, Nevada, in said Lease and Option described.

The total purchase price to be paid for the right, title and interest of the said J. W. Dunfee, of, in, and to, said Lease and Option, and to Le Champ d'Or French Gold Mining Company, Limited, for title to said mining claims and mining property, property, and fixtures, shall be \$40,000.00 to J. W. Dunfee and \$40,000.00 to Le Champ d'Or Gold Mining Company, Limited, making the total amount paid, the sum of \$80,000.00, in the manner and upon the payments and terms herein provided.

Possession of said mining claims and property, fixtures, and personal property, shall be given by the party of the first part to the party of the second part, at the end of thirty (30) days from the date hereof, said time being given Le Champ d'Or French Gold Mining Company, Limited, to make and deliver said Deed to be placed in escrow as aforesaid, and should the said Le Champ d'Or French Gold Mining Company, Limited, refuse to make and deliver said deed at the end of thirty (30) days as aforesaid, then and in such case of refusal to make and deliver such deed, the party of the second part shall have the right to do two things, to wit: First, to purchase said Lease

and Option and proceed to develop said mines and mining claims thereunder, or Second, to draw down said \$15,000.00 deposited to the credit and for the use and benefit of J. W. Dunfee, in the Bank of John S. Cook & Company, as aforesaid, and be released from this agreement. In case of the party of the second part making choice of drawing down said sum of \$15,000.00, it shall do so within ten (10) days from the end of said Thirty (30) days, or upon failure to demand the withdrawal of said sum of \$15,000.00 within said ten (10) days, shall be deemed to have waived the right, and in such case of waiver, the party of the second part shall be considered to have elected to proceed under said Lease and Option in the development of said mines.

It is further understood and agreed that during said Thirty (30) days prior to the time of taking possession as aforesaid, the said J. W. Dunfee, shall sink the winze or drift therefrom, but shall do no other mining in said premises, with right to [183] ship the ore so mined in sinking and drifting from said winze, paying royalty therefor to E. Carter Edwards, attorney in fact of Le Champ d'Or French Gold Mining Company, Limited, as in said Lease and Option provided.

When the full payment of \$40,000.00 shall be paid to J. W. Dunfee, according to the terms, and upon the payments in this agreement provided, the assignment, sale, transfer, and conveyance of all the right, title and interest of J. W. Dunfee, of, in, and to, said Lease and Option, shall become and be fully

vested and completed in said A. I. D'Arcy without any further or other instrument in writing to make or effect such assignment or transfer from J. W. Dunfee to A. I. D'Arcy, and as if such assignment had been made upon the immediate payment of the whole of said \$40,000.00 in cash by the said A. I. D'Arcy to the said J. W. Dunfee.

Upon the full payment of said \$40,000.00 to E. Carter Edwards, attorney in fact, as aforesaid, the said Le Champ d'Or French Gold Mining Company, Limited, hereby agrees to make, acknowledge, execute and deliver to A. I. D'Arcy, Trustee, the deed mentioned and agreed to be made in said Lease and Option to J. W. Dunfee, to be placed in escrow for delivery as aforesaid.

The said party of the second part hereby agrees to develop said mines and mining claims, and to ship no ores therefrom of the value of \$30.00 and under per ton. That the party of the second part shall have the right, however, to ship all ores mined or found in said premises over the value of \$30.00 per ton, or not, at his choice or discretion. In case of shipment of ores as aforesaid, the net proceeds of such shipments, to be determined by first deducting the total costs, charges and expenses of hauling, transportation, treatment or reduction, and taxes, shall be paid and distributed, as follows, to wit: Royalty to E. Carter Edwards, attorney in fact of Le Champ d'Or French Gold Mining Company, Limited, by the purchaser or reducer of said ores as is in said Lease and Option provided, and

the balance of said net returns to J. W. Dunfee, party of the first part herein to be applied on the next payment or payments coming due hereunder, instructions to be given by the said E. Carter Edwards, attorney in fact, J. W. Dunfee and A. I. D'Arcy to the purchaser or reducer of said ores so shipped, which said three parties hereby agree to give, directing such payment and distribution of such net returns.

Time is the essence of this contract or agreement, and promptness is demanded, and should the said party of the second part neglect, fail, or refuse to make any payment to the said J. W. Dunfee, or to E. Carter Edwards, attorney in fact as aforesaid, in this agreement or in said Lease and Option provided, then, and in such case of neglect, failure, or refusal to make such payments, the party of the first part hereto, or Le Champ d'Or French Gold Mining Company, Limited, respectively, shall have the immediate right to forfeit all the rights of the party of the second part, of, in, and to, this agreement and under said Lease and Option, and in case of such forfeiture or forfeitures, all moneys paid hereunder, or under said Lease and Option, whether to said J. W. Dunfee or to E. Carter Edwards, attorney in fact as aforesaid, shall be retained by said J. W. Dunfee and Le Champ d'Or French Gold Mining Company, Limited, respectively, as liquidated damages for the breach of this agreement and of said Lease and Option, and the party of the first part shall have the right of immediate possession of said mining claims and

mining property, property, and fixtures herein agreed to be sold, with or without process of law, which possession the [184] party of the second part hereby agrees to surrender and give up peaceably to the party of the first part, and the full terms of said Lease and Option shall be revived and reinstated in the party of the first part as if this agreement had never been made.

As evidence of the consent and approval of Le Champ d'Or French Gold Mining Company, Limited, to this agreement in writing, as well as to its agreement to make, execute, and deliver the Deed in said Lease and Option provided, to A. I. D'Arcy, Trustee, it has joined in the signature of this Agreement.

IN WITNESS WHEREOF, the parties of the first and second parts hereto, and Le Champ d'Or French Gold Mining Company, Limited, showing its consent in writing to this Agreement, have hereunto set their hands and seals, and Le Champ d'Or French Gold Mining Company, Limited, has caused the same to be executed by its attorney in fact, E. Carter Edwards.

J. W. DUNFEE, (Seal)

Party of the First Part.

A. I. D'ARCY, (Seal)

Party of the Second Part.

LE CHAMP D'OR FRENCH GOLD MIN-
ING CO., LIMITED,

By Its Attorney-in-Fact;

E. CARTER EDWARDS,

In Consent and Approval. [185]

(Testimony of A. R. D'Arcy.)

Cross-examination by Mr. TILDEN.

I examined the Orleans property also in July, 1920. I had been through the mine and at various times I had taken a few samples and I don't recall just how many times, but I had been through the mine several times before 1920. I am familiar with all of the levels of the mine. There are two working shafts on the Orleans property, one called the Orleans shaft, and the other known as the Dunfee shaft. I examined the Orleans shaft in July, 1920. We went down the shaft, went through the workings west of that shaft, all that were available and open; then we came up and walked through the 150-foot level over to the Dunfee shaft; then we went along 150-foot level as far as we could go to the east or southeast, then through the various levels on down to the 600-foot level, inspecting each of the levels as we went through. This examination took practically a day. I was not again on the property until about April, 1921. I am now able to give the exact dates. The date of the agreement between Mr. Dunfee and myself was July 18, 1921, and the date of the payment of the \$15,000.00 was the same. The date of the charter of Orleans Hornsilver Mining Company was July 22, 1921. The date the 150,000 shares were delivered to Mr. Dunfee was the latter part of July, I think it was the 30th, of 1921. I think I made a mistake in my former testimony in the date of the years; they are 1921 and 1922. The stock payment was

in 1921. The date of the payment of \$4,028.33 was January 3, 1922.

(A letter heretofore identified, dated December 28, 1916, marked Plaintiff's Exhibit No. 15, is admitted in evidence without objections and is as follows:) [186]

PLAINTIFF'S EXHIBIT No. 15.

Goldfield Hotel,
Goldfield, Nev.

Dec. 28, 1916.

C. A. Terwilliger
Brawley Cal.
Friend Cal.

Rec. \$500 today this makes total \$2000 you have sent me.

Mr. Elsman told me he had sent you the Final Report I got after him and he was supposed to mail it about 2 weeks ago. I will get in communication with him and see what the reason he hasent sent it. They have arrived to make the survey for the water for the mill. They are supposed to have \$150,000 ready by 2 of Jan. 1917. If you dont arrive by first of year I will write my Co. a report for the year and also ask that lease be extended as their letters states that no doubt I can have it as long as I want it. Will mail you a report up to Dec 31 1916. Just now I am cross-cutting at 345 level. Not in ore. At present as you fully realize that everything is not ore. Will let you know just what this work discloses by first

which will show us just what to do about sinking our shaft deeper. The mine is always ready for inspection so come when you are ready to look it over.

Yours very truly,

J. W. DUNFEE.

Will call on Belmont to see if I can get the facts you ask for.

(Envelope:) (Goldfield) (2-1¢ Stamps)
 (Dec. 29)
 (7—AM.)
 (1916)

J. W. DUNFEE

Hornsilver

Nev.

C. A. TERWILLIGER,

Brawley,

Cal.

Imperial Valley. [187]

A letter heretofore identified, dated March 21, 1917, marked Plaintiff's Exhibit No. 16, is admitted in evidence without objection and is as follows: [188]

PLAINTIFF'S EXHIBIT No. 16.

Goldfield Hotel

Goldfield, Nev

March 21 1917

Friend Cal.

Rec your letter and telegram. We are compelled to aid all we can in getting the mill in Hornsilver.

I was called to Reno to discuss treatment charges for our ore, and they claim as we are largely benefited by mill we should stand half of the water expenses. Now you must realize it is absolutely necessary that we have a mill or it is curtains with us, so I am trying to work out a plan here to get the water in Hornsilver. Dont get peeved about what you read in the newspaper there misleading write up every day. It was you that wanted the Eng. Report not me and he answered the purpose, so it not necessary to fall out with him or he might give the other Co. valuable information. We had to much over head expense I going to avoid any in the future Just actual work in the mine will be allowed. I haven't shipped but one car this month. Expect truck here within a week to ship again. The ore went about \$25.

I got lease extended one year to June 1919, as I assured you I could, but the proviso is that I am to be the manager of it as they state they rather work the property by Co. account than to have the mind handled by strangers as they realize no Eng. ideas as good as mine in working this mine for all experts turned it down. Sorry to say we can't pay a 10% dividend in April as we must sink our shaft soon. I drifted out 160 ft. on the 400 no shipping ore. This point seems to be where the hang had dropped and cut the ore up pretty bad. Sink-

(Testimony of E. Carter Edwards.)

ing I believe will overcome it. Best regard to all the stockholders. [189]

Yours Truly,

J. W. DUNFEE.

(Envelope:)	(Goldfield)	(2¢ Stamp)
	(Mar 22)	
	(6 AM)	
	(1917)	

J. W. Dunfee
Hornsilver, Nev.

C. A. TERWILLIGER
Brawley Calif

Imperial Valley. [190]

TESTIMONY OF E. CARTER EDWARDS, FOR PLAINTIFF (RECALLED.)

E. CARTER EDWARDS, recalled for plaintiff, testified as follows:

Direct Examination by Mr. STODDARD.

The last directors' meeting held by the Orleans Mining & Milling Company was held November 11, 1918. The last meeting of stockholders was held in Los Angeles, California, August 14, 1917. At the directors' meeting above mentioned the directors present were Mr. Dunfee, myself and Mr. Ellsworth. Mr. Ellsworth is now deceased. (Witness is shown minute-book of Orleans Mining & Milling Company and reads from minutes of directors' meeting of November 11, 1918, as follows:)

“Goldfield, Nevada, November 11, 1918. Meeting of Board of Directors at the office of the company

(Testimony of E. Carter Edwards.)

at 106 East Crook Street. Directors present: J. W. Dunfee, President; C. H. Ellsworth; E. Carter Edwards, Secretary. The statement of J. W. Dunfee as general manager of the business of the company, closing down the lease was presented to and examined by the Board, by which it appeared that the company was entirely out of funds, with some unpaid bills out. Upon discussion of the statement, the letter of C. A. Terwilliger, bearing date September 30, 1918, was produced and read to the Board, in which he ordered the mine closed down for the reasons stated therein, which letter is referred to and hereby made a part hereof. It appearing to the satisfaction of the Board that the company was without funds, it was duly moved and seconded that said statement be accepted, and the lease be closed down according to the request of Mr. Terwilliger in said letter contained. There being no further business before the Board, the meeting was adjourned until the next regular meeting." Signed J. W. Dunfee, President. A. Carter Edwards, Secretary." [191]

The WITNESS.—(Continuing.) I cannot state exactly how many tons of ore were extracted from the Orleans group of claims during the operations of the Orleans Mining & Milling Company. I think I got some \$15,000.00 of royalties out of the operation, the royalty being the greater part of the time $26\frac{1}{4}\%$ of the net proceeds. I left those matters of the operation to Mr. Dunfee and Mr. Terwilliger, and I preferred that, because I was attorney-in-fact

(Testimony of E. Carter Edwards.)

for my company, and I at all times preserved myself for the uses and purposes of my company. As I said before, these men insisted on my being a director against my wish, and I remonstrated and told them that I had to represent the French Company, and I might make decisions that they might not like.

TESTIMONY OF J. W. DUNFEE, FOR PLAINTIFF.

J. W. DUNFEE, the defendant, called as a witness by plaintiff, duly sworn, testified as follows:

Direct Examination by Mr. STODDARD.

I was and am president and general manager, treasurer and director of the Orleans Mining and Milling Company. About 4,500 tons of ore were extracted by the Orleans Mining & Milling Company during its operations upon the Orleans group of mining claims. This includes ore of all classes. The shipping ore averaged about \$23.00 a ton, the milling ore around \$14.00 and \$15.00. Included in the 4,500 tons of ore extracted were about 3,500 tons of milling ore and about 500 tons of shipping ore—about 800 and something, of shipping ore. I have got that wrong. There were about 800 tons of shipping ore and the balance of the 4,500 tons was milling ore. The company paid one ten per cent dividend only to the Brawley stockholders.

Cross-examination by Mr. TILDEN.

That ten per cent dividend amounted to \$800.00.

(Testimony of J. W. Dunfee.)

It did not come out of the profits of the mine. It came from Mr. Terwilliger's \$5,000.00 he put up to make his last payment. That came [192] about in this way; he said if he would let me pay a ten per cent dividend he would go down there and raise \$40,000 or \$50,000.00 to buy the mine if I would let him pay that ten per cent dividend.

Redirect Examination by Mr. STODDARD.

Mr. Terwilliger did not receive any of that ten per cent dividend; he was supposed to take it to the Brawley stockholders; I mean for the other stockholders excluding Mr. Terwilliger.

Mr. TILDEN.—Didn't he receive \$2,500.00 of it? (Referring to the \$8,000.00 raised by Mr. Terwilliger.)

(A.) Yes, according to his own checks.

Mr. STODDARD.—That is plaintiff's case in chief.

Mr. TILDEN.—Before you close, Mr. Stoddard, I want to ask Mr. Terwilliger: The mine equipment all belonged to the French Company, did it not?

Mr. TERWILLIGER.—Yes.

Mr. STODDARD.—I want to ask at this time permission to amend the complaint by interlineation, and I will submit it to counsel for any objections he may desire to interpose. The interlineations, if your Honor please, that we desire to make by way of amendment at this time, the first is not objected to by counsel. The second proposed interlineation by way of amendment, the first is at line 10, on

page 9 of the complaint: "Did secretly negotiate for and later," after the word "later" we desire to insert the words "to wit, on June 5, 1920." An amendment which we also desire to make at this time, and which I understand is objected to by counsel, is on line 12, of the same page 9, erase "December, 1920," the first two words on line 12, and then insert, "January 1, 1921, obtain a modification, renewal and extension of said lease, and thereupon"; so that as amended it would read, commencing at line 10, page 9, "Did secretly negotiate for and later, to wit, on June 5, 1920, obtain from said French Company a lease of said mining claims, and [193] on or about January 1, 1921, obtain a modification, renewal and extension of said lease, and thereupon the said defendant Dunfee," continuing.

Mr. TILDEN.—We object to that, may it please the Court, on the ground it is not justified by the showing made by the plaintiff. The only showing in this behalf is from the lips of Mr. Edwards, to the effect that this June 5th lease was surrendered in the fall of 1920, and was thereupon marked cancelled by himself, attorney-in-fact for the lessor company. The further objection is that it is a matter of construction as to whether or not anything is a modification, renewal or extension. There certainly is no evidence that lease number three was intended as a modification, renewal or extension, and if upon its face it was such, then it speaks for itself, and becomes a matter of law as to what it is

and its character. I don't think there is any evidence whatever to justify such an amendment. I suggested to counsel that he say that on January 1, 1921, a further lease, or another lease, or an instrument was issued, of which a copy is attached to the complaint, and let that copy speak for itself as to what it is.

Mr. STODDARD.—We desire to make the amendment as offered, if the Court please, and base upon it the facts that have been adduced upon the plaintiff's case in chief, and upon the lease itself.

The COURT.—I will allow you to make the amendment. Of course it will be subject to the objection. This is not a ruling on my part that they have proven it; I am simply allowing them to put that in the complaint because they believe it does conform to the evidence; the defendant thinks it does not, and that will be one of the things I must decide. You may take your exception. [194]

Mr. TILDEN.—If your Honor will allow me.

The COURT.—That is all?

Mr. STODDARD.—That is the plaintiff's case in chief, your Honor.

Mr. TILDEN.—May it please the Court, at this time defendant Dunfee moves for a dismissal on the ground that no equity is shown by the complaint, and none is shown by the evidence; and on the ground heretofore raised in the previous part of the trial; namely, that the dismissal of the action as to the D'Arcy Company leaves no cause

(Testimony of R. H. Downer.)

of action as to anybody. I said at that time that I could have been prepared with authorities, and I am now prepared with a few on that subject. The motion so far as it relates to the equities of the case I have sketched in writing, so I can present it in the very briefest possible time; and at the outset I will call your Honor's attention to what I believe to be the proper deductions for us to take from the contract set forth in the complaint and the matter supplemental to the contract set forth in the complaint.

The COURT.—I will overrule the motion for the present.

Mr. TILDEN.—Your Honor will allow us an exception?

The COURT.—Certainly.

TESTIMONY OF R. H. DOWNER, FOR DEFENDANT.

R. H. DOWNER, called as a witness for the *plaintiff*, duly sworn, testified as follows:

Direct Examination by Mr. TILDEN.

I live at Goldfield, Nevada. Am a mining engineer and assayer. Have been such in Goldfield and Colorado since 1901.

Mr. STODDARD.—There is no question at all about his competency.

The WITNESS.—(Continuing.) I have been familiar with the Orleans property since July, 1921. There are two working shafts on that property,

(Testimony of R. H. Downer.)

connected. I made a map of the underground [195] workings based upon a map previously made by the engineers employed by the Tonopah Mining Company. I have made several maps, the last one carrying the work up to date, March 1, 1922. I checked up the work shown on the map given me by the Tonopah Mining Company and also included on my map such work as had been done since the making of the map of the Tonopah Mining Company. (Witness produces map made by him and the same is offered in evidence on behalf of defendant Dunfee.)

Mr. STODDARD.—We will object to the offer, if your Honor please, on the ground that this map shows the condition of the mining property in 1922, I understand.

Mr. TILDEN.—Our idea is to show the condition from time to time.

The COURT.—What is the purpose of that in a suit against Mr. Dunfee?

Mr. TILDEN.—I am going to show that all of these allegations of concealment and of a valuable condition in the mine itself made by the plaintiff, and upon which plaintiff apparently bases his cause of action, are not in accordance with the fact.

The COURT.—Well, it would be concealment of conditions at that time; the mine may have been enormously rich, and may have been a wretched mine at that time.

Mr. TILDEN.—I am going to try to give your Honor a view of the mine, and then I am going to

take the witnesses through the mine by means of this plat, and prove what the condition of the mine was at the time it was shut down, and the conditions that developed in the mine from the time that Mr. Dunfee ceased.

The COURT.—Do you contend that you should recover anything more than your share of what Mr. Dunfee received when he sold that property?

Mr. STODDARD.—No, your Honor; that is solely the proposition. [196]

Mr. TILDEN.—If it please the Court, must we not show that Mr. Dunfee did not conceal from these people?

The COURT.—Certainly, but suppose he did conceal after he had made the sale, what difference would that make?

Mr. TILDEN.—It would not make any difference, your Honor; but here is a man that illustrates all that I desire to prove, and it happens to illustrate a little more.

The COURT.—Well, go on; you can show the condition of the mine from the time it was sold, backwards.

Mr. TILDEN.—That is just what this map will do.

The COURT.—Up to the time that the lease was sold to Mr. D'Arcy and his associates.

Mr. TILDEN.—I ask that this plat be introduced in order to illustrate the testimony of the witnesses, who will do what your Honor just suggested.

The COURT.—Very well. It is only admitted for

(Testimony of R. H. Downer.)

illustrated purposes; it is not admitted as being a correct statement of condition in the mine at the time the lease was sold by Mr. Dunfee to Mr. D'Arcy. (The said plat is appended at the end of this statement.)

The WITNESS.—(Continuing.) I think this plat is prepared with sufficient detail to show conditions of this property in 1918, 1917 and 1916. I was not present to investigate the conditions at that time. The developments as I understand them, that have taken place during those years, do not materially change the condition of the mine; the ore that was extracted by Mr. Dunfee was mostly taken out previous to that time; then the map showed the condition as the Tonopah Mining Company found it at the time of the sale; my investigation is verified by conditions; that refers to the workings in the older part of the mine, disregarding that subsequent work by Mr. D'Arcy. I have no information regarding development work upon that property for, for instance, [197] the year 1917. The map does not designate or differentiate the work by the year or anything of that kind; it shows the total development work that has been done.

The COURT.—Can you draw a line through this map showing how far the work had extended on the date when the lease was sold to Mr. D'Arcy?

(A.) Yes, sir, I think I could.

The COURT.—To Mr. Stoddard: If he does that will you be satisfied?

Mr. STODDARD.—Yes, your Honor.

(Testimony of H. G. McMahon.)

The COURT.—Please do that, Mr. Downer, and put your initials on the line after it is drawn.

(The witness does as directed.)

(The map is admitted in evidence and marked Defendant's Exhibit "K." Mr. Downer was temporarily withdrawn as a witness.)

TESTIMONY OF H. G. McMAHON FOR DEFENDANT.

H. G. McMAHON, called as a witness by the defendant, duly sworn, testified as follows:

Direct Examination by Mr. TILDEN.

I live in Goldfield and have lived there or in the state since 1905. I am a miner. My experience as a miner has been that since 1900 I have been engaged in the development of mining properties in their operation, and the operation of surface works, in so far as they apply to mining operations, and the purchase and sale of mining properties. This has included the examination of mines, with the object of learning their value from their appearance. I have been actively engaged in that line for more than twenty years. Am familiar with the Orleans property to a certain extent. My first visit to the Orleans mine was I believe in July, 1920. I spent about one day at the property in the examination of the mine. There are two working shafts, one called the Orleans and the other the Dunfee shaft. (Witness indicates same on map.) [198] In making my examination we started at the collar

(Testimony of H. G. McMahon.)

of the Orleans shaft, and climbed down to the 200-foot level, and then passed along this level, examining what appeared therein; then we climbed up to the 150-foot level and went over to the Dunfee shaft, and then climbed down that shaft to the 600-foot level, and on route visited all of the workings that were accessible. When I say I climbed down to the 600-foot level, that means that I climbed down to the point marked with the red line on the map by Mr. Downer (the preceding witness.) I examined the mine with respect to its ore showings. I don't recall exactly what parts were inaccessible, there might have been some workings in the upper level that were closed with cavings, but I don't recall just what the condition was there. The bottom of the Orleans shaft was open. I made this examination with the idea of purchasing the property.

Mr. STODDARD.—If your Honor please, we want to interpose an objection to all this line of testimony, as to what parties examined that mine subsequent to the times mentioned; and also to all testimony as to what attempts were made by defendant Dunfee to sell to various parties. The point that we are concerned with, and what is in issue here, is the fact that this officer, holding and occupying a fiduciary relation to the stockholders of this company, did sell the property, and not as to what dickers he made; and we will object to any testimony in that respect as being absolutely irrelevant and immaterial to the issues in this case, and

(Testimony of H. G. McMahon.)

to the condition of the mine at any time subsequent to July, 1921, as being entirely incompetent; and we wish to interpose and have that objection go to all this class of questions.

MR. TILDEN.—The purpose of this question is to show that Mr. McMahon did not go there as an idle spectator, that he went there with a substantial business reason; that the mine had been [199] offered to him for a certain sum of money, and that after an examination of the mine he refused to entertain the offer at that or any sum.

THE COURT.—The testimony may go in subject to Mr. Stoddard's objection.

MR. STODDARD.—All testimony of this character.

THE COURT.—Well, if there is anything new I want you to suggest it.

MR. STODDARD.—I will suggest it, if the Court please.

THE WITNESS.—(Continuing.) I had a proposition pending concerning that property from Mr. Dunfee. He offered to sell his lease and option to purchase the mine for \$6,000.00.

MR. STODDARD.—That is objected to; these questions are under the ruling?

THE COURT.—Yes, they are all objected to; and I suppose the objection is broad enough to cover this too.

THE WITNESS.—(Continuing.) I rejected the offer. I based my rejection on the fact that I thought that the showing in the mine would not

(Testimony of H. G. McMahon.)
justify the payment, or any payment. There were no representations made to me as to ore in the mine, and my only object in passing through it was to note the geological condition. Mr. Dunfee made no representation of ore, and I saw none. I won't say that exactly; there was some ore there, but there was no tonnage. As to the ore that I did see in the west end of the property, in the vein where it was exposed on the 200-foot level, there was some ore which Mr. Dunfee represented as worth \$2.00 a ton. I took no samples. Down in the east end of the property in the lower levels, only a few colors remained and some broken ore lay along the drift; there was no tonnage at all in that end of the mine. I didn't see any ore in the lower levels except just the few tons of broken ore. There were places undoubtedly where the vein appeared, that was of low grade material; it was not [200] represented to me as being commercial grade, and I took no samples as Mr. Dunfee had made no statement that it was a commercial grade, I considered that of course it wasn't. Mr. Dunfee took a couple of samples. The lowest and the furthest point in the mine that I visited was on the 600-foot level, and reached out to about this point (pointing to a point through which the vertical line was drawn by Mr. Downer the preceding witness) the workings stopped there.

Cross-examination by Mr. STODDARD.

I arrived on the property some time during the morning and stayed there until late in the after-

(Testimony of H. G. McMahon.)

noon. I was actually in the property in the neighborhood of six hours. I took no samples and had none assayed. Two samples were taken by Mr. Dunfee and were panned on the surface. That was my first visit to the property.

Q. I assume you understand what wasn't ore was what Mr. Dunfee didn't claim to be ore; is that correct?

A. He made no representation of any ore there, so I of course assumed that the material wasn't pay.

Q. And you are testifying upon that information, are you not? A. Yes.

The WITNESS.—(Continuing.) The ore that was panned was from the smaller pillar, and some loose material in the drift that Mr. Dunfee sampled, and these samples were taken to the surface and ground up and panned, and they showed some value. That is the only examination as to values that I made. My other information as to values was acquired in this way: In passing down through the mine I made as close an observation of it as possible, and there was no place in the mine where any mineralization showed that would indicate to me as a practical miner that it [201] would carry any value. One becomes accustomed to visiting mines, and can tell whether the material looks as if it will carry values or not.

Q. Would you in examining such a property, with the view of purchasing it, rely upon such an examination?

A. Indeed not; if I thought it was worthy of

(Testimony of H. G. McMahon.)

purchase I would then sample it very thoroughly, but in that case I didn't feel that the property was worthy of examination and sampling.

Q. Your feeling in that respect and your judgment in that respect were guided largely then by representations made by Mr. Dunfee as to values and mineralization, and what the mineralization in that particular ledge or drift carried?

A. Rather the lack of representations made by him.

TESTIMONY OF A. I. D'ARCY, FOR DEFENDANT.

A. I. D'ARCY, called as a witness by defendant, previously sworn, testified as follows:

Direct Examination by Mr. TILDEN.

Mr. TILDEN.—Are Mr. D'Arcy's qualifications as a mining engineer admitted?

Mr. STODDARD.—Certainly.

The WITNESS.—As I said in my previous testimony, prior to July, 1920, I made several trips. I don't recall just how many. I think the first one was in 1916, and from there on several trips in addition, to the Orleans mine; and then of course since July 18, 1921, I have had the management and control of the operation of the mine. I was there in July, 1920, when Mr. McMahon the preceding witness visited the property as described in his testimony.

(Testimony of A. I. D'Arcy.)

Mr. STODDARD.—We renew our objection to these matters.

The COURT.—Very well, it all goes in subject to the objection.

The WITNESS.—(Continuing.) That trip consisted of a trip [202] as described by Mr. McMahon; I don't think I could add anything to that. We went down the Orleans shaft to the 200-foot level, walked through to the end of the level, and then came back and climbed back to the 150-foot level; then walked along the 150-foot level to the Dunfee shaft, and then as far in the 150-foot level as we could get on account of a cave that was farther in that; then down the shaft and visited the various levels to the bottom, the 600-foot level. There was a drift run out in the 600-foot level. (Witness points to same on map, indicating a perpendicular red line running through a cross-cut.) This drift runs along the footwall of the vein, and this is a cross-cut which comes out towards the hanging-wall of the vein; the vein is dipping towards us; this drift runs along the footwall side of the vein, and at this point here (indicating) there is a cross-cut comes out towards the hanging-wall, and it was right in here that the end of the drift was at that time.

Q. Is that point about which you have just testified the point through which the vertical red line runs?

A. If I were drawing a line at the end of the drift at that time, I would draw it back a little

(Testimony of A. I. D'Arcy.)

further than that, because the red line cuts a portion of the cross-cut, and that cross-cut was not visible at the time I visited the property in July, 1920.

Q. That work evidently extends further than the point which you have indicated; what is that further extension?

A. Well, that is work that was done subsequent to July, 1920.

Q. Do you know by whom it was done?

A. Yes.

Q. By whom? A. By Mr. Dunfee.

Q. Now I am going to ask you to tell what you saw up to the point of that vertical line, describe the mineralization [203] briefly, and then the mineral values, and then compare that with the work beyond that point, which you say was afterwards done by Mr. Dunfee.

A. Well, these drifts follow what is known as the Orleans vein; these go out there, and there is more or less quartz and mineralization there; there is a stope, showing where ore had come out, and little pillars that were left there of the character of ore that had come out of there. And then the condition of the vein beyond the point that had been stoped, we were able to compare the character of the pillars with what remained at that time; and that is true, not only here but all through the mine; these works follow very close,—follow the Orleans vein, and they wave around, may not follow one streak, but they are always in the vein, it is a wavy

(Testimony of A. I. D'Arcy.)

vein, and the drift can take in the whole vein but this point here. I will state the idea I had in mind was this, that there were certain little pillars left in the old stopes, that we were able to compare the physical appearance of that ore in comparison with the balance of the vein through the mine; there was no showing, that is, none of this material that was being shipped, or stoped rather.

Q. In your last answer you have been testifying concerning the 200-level of the Orleans?

A. I mean that is the same. I am using that simply to illustrate. The conditions I found throughout the mine down to a point here (indicating on Exhibit "K"), and right in here we did find some of the same quartz material, that looked like and had the appearance of being pretty good ore.

Q. When you say here, how can you indicate that so it will get in the record?

A. Well, it is in what we call a little underhand stope on the 600-foot level at that time.

Q. What was the result of your comparison of those [204] pillars with the rest of the mine?

A. Well, I came to the conclusion that there was no ore bodies in sight in the mine, that is, of the commercial grade of ore that we were looking for, and at that time I remember of taking a few samples just simply to verify that opinion; I don't think there was very many of them. I think there was only four or five.

Q. You say there were no ore bodies; was there any mineralized ore in sight?

(Testimony of A. I. D'Arcy.)

A. Yes, there was quartz; there was the ordinary vein filling that you find in this particular character of veins.

Q. Now I asked you to compare the work on that 600-level done by Mr. Dunfee after the time you were there, that you have just described, with the rest of the work in the mine.

A. Well, that was very much higher grade stuff, I know, because I had the privilege of sampling it, and finding that it was a very much better grade, and subsequent sampling that has been done in the mine has proven that those upper exposures were of low-grade stuff, low-grade material.

Q. Did you measure that additional work done by Mr. Dunfee? A. I think I did; yes.

Q. To what extent was it sampled?

A. Well, every five feet, it was sampled very thoroughly.

Q. Can you tell the Court on the strength of what you entered into the deal with Mr. Dunfee that is involved in this action?

A. It was entirely on the showing beyond the point of the drift in July, 1920, and what I saw, I think it was April, 1921; in other words, it is the point just beyond the red vertical line, that is taking into consideration my objection to the red line not being quite far enough this way. [205]

TESTIMONY OF GORDON M. BETTLES, FOR
DEFENDANT.

GORDON M. BETTLES, called as a witness on behalf of the defendant, duly sworn, testified as follows:

Direct Examination by Mr. TILDEN.

I live in Goldfield; am a mining engineer; have been such for ten years, practicing the last seven years in Goldfield, and prior to that in Utah. Am familiar with the property known as Orleans at Hornsilver. I was in that property the first time in October, 1920, and on two or three occasions since. I went there to examine the property for the purpose of purchasing it, if it met with my satisfaction after examination.

Q. Tell the Court what you did after that date.

Mr. STODDARD.—We make the same objection.

The COURT.—It will be admitted subject to the objection. I wish you would be just as brief as you can with that, Mr. Bettles.

The WITNESS.—(Continuing.) I made a thorough examination of the property, covering almost two days, and did some sampling.

Q. How far had the property been developed at that time? A. Shall I indicate on the map?

Q. If you will.

Mr. STODDARD.—The same objection to all of this.

The COURT.—It will be the same ruling.

(Testimony of Gordon M. Bettles.)

The WITNESS. — (Continuing.) Referring to the vertical line drawn by Mr. Downer, that, I should think, was the point when the work was ended when I examined the property. My examination was with respect to values in sight if they were any such. I did not find any that I could consider of commercial value. As the result of my examination I did not accept the offer, which was for \$2,000.00 in cash, and a 20% interest in any company which might be formed to finance and work the property. I went there a couple of times after ore had been discovered by Mr. Dunfee, purely as a matter of interest to check up on my former examination. [206] I can't state definitely how far the point of discovery of the Dunfee was from the point I have indicated as the lowest working at the time of my examination in October, 1920, but I should say within possibly 30 or 40 feet.

Mr. TILDEN.—In view of your Honor's desire that I make this very short, I will say that is all that I want of this witness.

Cross-examination by Mr. STODDARD.

I took some samples on my first visit and had them assayed with the result that they were unsatisfactory; some of them were interesting; they did not indicate the presence of ore in commercial quantities, which I was looking for. I was accompanied by an associate of mine when I went through the property and by Mr. Dunfee.

TESTIMONY OF WILLIAM E. SIRBECK, FOR
DEFENDANT.

WILLIAM E. SIRBECK, called as a witness for the defendant, duly sworn, testified as follows:

Direct Examination by Mr. TILDEN.

I live in Goldfield. My business is that of mine executive; have been such off and on since 1906, practicing that business in Nevada and Arizona. I have had experience in the examination of mines for ten years off and on, with J. K. Turner, consulting engineer. I know the Orleans property at Horn-silver; examined it in January, 1921, with the view of purchase. I had a pending deal to purchase Mr. Dunfee's lease and option for \$2,500.00.

Mr. STODDARD.—Same objection.

The COURT.—The same ruling.

Mr. TILDEN.—Q. Any interest in the ground?

A. None whatever.

The WITNESS. — (Continuing.) In examining the property I entered the main Dunfee working shaft, went to the 400-foot level, where the ore was removed, and went down the shaft from there to the lowest [207] level, and went up both drifts. I only took two samples, one at the 400 in the drift from the cave above, and one in the drift in the west end of the main drift at the 600-level. I am familiar with the point in the mine on the 600-level indicated by a vertical line drawn by Mr. Downer in the plat in evidence. That cross-cut had been driven at the time that I saw the property between

(Testimony of William E. Sirbeck.)

184 and 200 feet up to the Downer line. Cross-cuts indicated on the map were not in existence at that time. My examination did not include the Orleans shaft. I did not find any bodies of ore in the course of my examination. I found some mineral.

(Q.) To what extent?

(A.) Well, my two assays. I don't remember exactly but they were under ten dollars. As the result of my examination I rejected the property on the ground that I didn't feel like paying any cash for something without any commercial ore in sight.

Cross-examination by Mr. STODDARD.

I took only two assays. They were from the 400 level where this ore was stoped out, and the 600 level in the west end. There were at that time at the 600-level drifts from 180 to 200 feet southeast and from 60 to 65 feet west. I was not to pay any consideration in addition to \$2,500.00 cash. That was the total, \$1,250.00 cash and \$1,250.00 in ninety days. My first acquaintance with Mr. Dunfee was in the early part of 1919, when I was operating in the Divide District. He accompanied me on these trips to the Orleans. On the trip that I have described I was down there about five hours. I went down there again before the time of my refusal, with Mr. Barnes, a Goldfield geologist, and spent another day with him. That was the extent of my examination prior to my making my decision.

(Q.) Did Mr. Dunfee make any representations as to ore bodies or ore being in the property available? [208]

(Testimony of William E. Sirbeck.)

(A.) He did not; in fact, I asked him, when I asked him if he wanted to sell his lease in the property, if he had any ore, and he said no, there might be some found.

TESTIMONY OF J. W. DUNFEE, IN HIS OWN BEHALF.

J. W. DUNFEE, defendant, called as a witness in his own behalf, previously sworn, testified as follows:

Direct Examination by Mr. TILDEN.

I am the defendant. I am a miner and have been such for about twenty years, in Colorado and in Goldfield and Hornsilver. I have mined off and on in Hornsilver since 1913. I became acquainted with the Hornsilver property in that year by being sent there to look after the work as superintendent. I worked in that capacity until October of that year, I having been sent there in about June, then the property was closed down, and April, 1915, I worked it again for about three months for the company. After that they proposed to close it down, did close it down, and I asked for a lease on it. That is the lease that was afterwards assigned to the Orleans Mining & Milling Company. (Witness makes a mark on the map in evidence at the point in the Orleans shaft indicating the point to which the development had been carried at the time he took the lease.) There had been no connection made between the two shafts

(Testimony of J. W. Dunfee.)

at that time. Under the lease I carried the work 140 feet to the southeast in the 150-foot drift. (Witness indicates by the letter "A" on plat the point to which this work was carried.) Then I sunk the Dunfee shaft down to the 447 feet. (Witness marks last-mentioned work on plat with letter "B.") Point "B" does not indicate the point to which the mine had been developed at the time of closing down in October or November, 1918, but indicates the point to which the mine had been developed when I assigned the lease to the Orleans Mining & Milling Company. To the date of closing down of the lease I carried the Dunfee shaft on down to the 600. I did about 260 feet [209] of work on the 600-foot level; I stoped ore out of what I call a winze stope on the 600-foot level. That is right in the course of the Dunfee shaft. I did about 350 feet of work on the 500 level and also took out about 700 tons of ore there—between 500 and 700 tons. Referring to vertical line drawn by Mr. Downer on the plat across the cross-cut at the 600, that indicates the place to which I carried the work up to the time of closing down. It was about 187 feet. From the time of closing down until June 5, 1920, I did no work; never was on the property. I first met Mr. Terwilliger in Rawhide in about 1907 or 1908; knew him in Goldfield. I came to enter into this enterprise with him in this way: I was in Los Angeles, and met him on the street one day, and we got to talking of mining and I was telling him of the Orleans mine and he became very much

(Testimony of J. W. Dunfee.)

interested and wanted to buy in with me. That resulted in my entering into the contract with him. He had not examined the property prior to that. I made a full and fair statement to him of its physical condition. As to getting extensions of the lease, I always represent that as long as we did the right thing to the company and kept working we could get extensions of the lease. He had not met Mr. Edwards up to that time. Mr. Edwards was first just acting as a director, until we got organized, just a temporary director. I took the matter up with Mr. Terwilliger; he came up in January and wanted Edwards to remain as a permanent director and secretary of the company and insisted upon that point. That was January, 1917. I told him approximately how much ore had been extracted up to that time—about \$75,000.00 gross. That had netted me about \$22,000.00. I am referring to the time that I had the lease. The owning company did not take out any ore. After I got the lease I took out about 75,000 or 80,000 dollars gross which netted me about \$22,000.00. The mine was self-sustaining at that time, that is up to the time I entered into the contract with Mr. Terwilliger. Work was being [210] done at that time. My getting Mr. Terwilliger in was with the view of purchasing the property. He told me how he could raise the money, how he had raised money on mining enterprises; if I would let him come in he would raise the money to buy the property.

Mr. STODDARD.—If your Honor please, we ask that the answer be stricken until we interpose an objection to that last question, upon the ground it is parol testimony, tending to vary the terms of a written contract.

Mr. TILDEN.—I think it is objectionable on that ground. If this is going to apply to counsel's case as well as mine, I am willing that should be the rule to govern this case.

Mr. STODDARD.—I don't believe it applies to the objections you made, Mr. Tilden, on the representations.

The COURT.—Well, you both seem to agree that this question is objectionable.

Mr. TILDEN.—It is certainly rebuttal of the testimony of Mr. Terwilliger.

Mr. STODDARD.—The testimony of Mr. Terwilliger, as I recall it, and the objections made by counsel, was upon the representations, particularly with reference as to ability to get renewals of the lease, and the confidence that Mr. Terwilliger had in Mr. Dunfee. The testimony now is that Mr. Dunfee went into the proposition on the supposition that Mr. Terwilliger was going to raise the money, and the contract sets forth very clearly what Mr. Terwilliger was to do as far as raising the money was concerned.

The COURT.—You cannot vary the terms of the written contract subsequently entered into. Put it in over the objections or not, just as you like; but I don't think I shall consider testimony of that kind

(Testimony of J. W. Dunfee.)

to modify the terms of the contract. [211]

The WITNESS.—(Continuing.) When Mr. Terwilliger came up in January, 1917, I believe he went down into the property. It was at that time that retaining Mr. Edwards as director was discussed. Mr. Edwards protested against acting as director. On the 1st day of August, 1918, there was a great deal of ore in sight in the mine and I was working on the 600-foot drift, driving southeast in the hope of finding ore. I afterwards mined out all of the ore—the commercial ore—then in sight, something like \$2,000.00 or \$3,000.00 net to the company. After I had mined that ore out there was no more commercial ore in sight. Prospects of developing further ore were good. Referring to the testimony of Mr. Terwilliger and Mrs. Terwilliger to the effect that I was in Goldfield before their trip to Hornsilver about the 1st of August, 1918, the fact is I was not in Goldfield on the occasion of that visit. They arrived at Hornsilver about four o'clock in the afternoon. They said they had to make Big Pine that night. They brought Judge Edwards along to have a conference with me. They all went into the office and brought out a paper which had been prepared by Judge Edwards, the August 1st report. It was made out in Goldfield and brought out to me to sign. After reading it over I kind of hesitated a little, wanted to have a further talk with them to see if this was the policy that Mr. Terwilliger and Judge Edwards had signed; so Judge asked Mr.

(Testimony of J. W. Dunfee.)

and Mrs. Terwilliger to leave the office and he would have a talk with me, and explain things to me; so they went out and we talked a bit, and I asked the Judge if this was what they decided on, and he said yes, he thought it was best; and I said, "If that is what you decide on, I will sign the report," and did sign it, then he called them in and Mr. Terwilliger was in a great hurry to get the report in his pocket, and he went out and got in the car and left for Big Pine, and said he had to make it. The entire visit of the Terwilligers at Hornsilver at that time didn't cover over [212] fifteen minutes. Nothing was said at that time as to my intention of closing down unless it was if we ran out of money we were to close down, and the mill quit working, and I would have to close, I told them that. The mill was supposed to close in September of that year but they kept on running until the last of October. Our treasury was very low; I didn't have enough money at that time to meet that month's pay-roll. There was nothing discussed exactly as to closing down; we were talking of future work. It was after that that I extracted this small amount of ore still in sight—that is \$2,000.00 or \$3,000.00. I recall receiving Mr. Terwilliger's letter of September 30, 1918. At that time the mine conditions were, all the ore was mined out; I had taken this ore in order to meet the pay-rolls and there was practically no ore in sight. I was really in debt at that time, the company was. I closed the mine down on account of no money to work the property, I had to;

(Testimony of J. W. Dunfee.)

in order to meet the pay-roll I had to go up the shaft to the 350, and take ore out from around the shaft, to meet my pay-roll. That was bad mining and I afterwards had to fix it up. After closing down the mine I made a report, the report of November 6, 1918, that has been introduced here. I recall its contents. It correctly states the mine conditions and prospects at that time—accurately. After meeting Mr. and Mrs. Terwilliger at Hornsilver in August, 1918, I next saw him in July, 1921, in Goldfield between the 25th and 30th. I corresponded with him between the time of closing down of the mine and this date that I have just given. I can recall some four or five letters that I wrote. They have all been introduced in evidence except one or two I think haven't. There was one in April that I wrote him, 1919; and there was one on the 2d day of March, 1920. Referring to the statement in the August 1, 1918, report that "the present conditions of the mine are good, we have uncovered a fine body of ore, running \$45.00 to \$50.00"—that is the body of ore I had in sight at the [213] time Mr. Terwilliger was in Hornsilver, at that time. That was on the 600-level in the winze going down. That is the body I have said that I exhausted before I closed down—a portion of the \$2,000.00 or \$3,000.00.

Mr. STODDARD.—(After search.) I find a copy of a letter dated April 12, 1919, from Mr. Dunfee to Mr. Terwilliger; we have no copy and have no

(Testimony of J. W. Dunfee.)

original dated March, 1920, except the letter dated March 26, 1920 (already in evidence).

The WITNESS.—(Continuing.) This (referring to letter dated April 12, 1919, produced by Mr. Stoddard) is not the one I refer to as one of the letters I wrote in April, 1919. I did not retain a copy of that letter; wrote it just in long-hand. It stated in effect we had to get to work on the Orleans property, as he knew we had to do sixty shifts by the last of May if we expected to hold our lease; that there was no money in the treasury, that we had to raise money, and I had paid up back bills, and the company was already indebted to me in the amount of \$400.00. That is practically all that I remember of the letter. I did not keep a copy of the March 2, 1920, letter. I have since seen it in the possession of Mr. Atkinson after Atkinson became Mr. Terwilliger's attorney. In it I was telling Mr. Terwilliger if he would come up we would get a new lease, but we would have to get to work, and I haven't talked the terms of the lease with Judge Edwards, but just stated we would take a new lease, and for him to come up; and after I had talked the terms over with Judge Edwards, he said he would give us a 2½ years lease if Mr. Terwilliger would come up and go to work, but that we could not bluff any longer, we had to go to work. Then I notified Mr. Terwilliger of that in my March 26th letter. His answer to the March 26th letter dated May 2, 1920, is the last communication I ever had from him. After the closing

(Testimony of J. W. Dunfee.)

down of the mine I went to Mokelumne Hill in California, had an option on a mine there; [214] and then I went back to Goldfield and sent a party to New York to try to buy this Mokelumne Hill mine; went out to Divide and located some claims in January, and then with other associates there we organized three companies in Divide—worked the properties there—then I went to Candelaria and bought into the Georgina mine, and during the fall months I was in Candelaria sampling and surveying the property, doing a little work; and then I went back to Goldfield in the fall, and stayed a couple of months, and then back into Candelaria in the spring of 1920 and made thorough examination and assay from that Candelaria property in January and February, did some work prospecting.

The COURT.—Does this have any bearing?

Mr. TILDEN.—Just to show that he was not engaged in the business of the corporation. (To the witness.) How did you come to take the June 5th, 1920, lease?

(A.) Well, we could not get any satisfactory letters from Mr. Terwilliger, nothing of the kind, and the lease had run out, it had been cancelled a year before that.

The WITNESS. — (Continuing.) The circumstance that led up to my taking the lease was, Judge Edwards asked me if I would take a lease on it and go to work. I wanted to test—wanted to do some work on the 300-foot level. I went to work about a week or ten days or two weeks after taking

(Testimony of J. W. Dunfee.)

the lease. At first I employed a Mr. Burke and Mr. Mitchell as miners, and I was working myself. I was paying Burke and Mitchell out of my own pocket. I worked them until Mr. McMahon (previous witness) was about to buy the lease in July, then we closed down for while; these two men and I worked about two months and a half and that took me up to the time Mr. McMahon came to examine, and I did about twenty days work at that time. After Mr. McMahon had been there I continued the work with Burke and Mitchell for the balance of the terms of two and a half months—that is the idea I desire to convey; [215] two and a half months all told. That was all at my own expense and I was working myself, sharpening steel and going down the mine. After I closed down in August of that year—1920—I made a trip to Los Angeles with the view of financing the whole camp. That was the last of August, 1920; then the 2d day of January, 1921, I went back and went to work alone in the mine. I hadn't been there from the last part of August until January 2d of the next year, 1921. The result of my work with Burke and Mitchell was nothing, we found no ore. I did 137 feet of work. When I returned in January I went to climbing the shaft and worked all alone at the 600-foot level; I first drove in a drift about ten feet on the 600-foot level at the point where the Orleans Mining & Milling Company left it. That is southeast of the line drawn by Mr. Downer on the map in evidence. The June, July and August, 1920, work was on the

(Testimony of J. W. Dunfee.)

350-foot level. I didn't start on the 600-level until I went back alone in January, 1921. I worked two months and sixteen days alone on the 600-level, except one man worked about five days with me during that time. He worked at my expense. I did at that time while working alone about 70 feet of work. Sometimes I had to go up and down the shaft twice a day; worked until eleven o'clock at night; got up early in the morning, and after the showing got to be good, got in some low-grade ore, I would come back on that night and stay until eleven o'clock. That carried me up to the 15th day of March, 1921. I then had some ore in sight; thought I could pay the men if I put them on, so I arranged for Joe Vernon, Andy Krion and Westfall to muck out the ore that I had stored in there; I had the drifts stored full; could hardly get in there, and worked 18 days, taking chances for their money of my getting out a shipment of ore. I also told them that if they didn't get the shipment out I had a life insurance I would put up; they would be sure of their money if they would just give me a [216] little time. While they were mucking I was running the hoist. After they got the muck out I had to drift about 30 feet where I had found the ore in an incline upraise into the hanging-wall side of the vein. (Witness indicates point on map, pointing to line made by Witness Downer.) It does not appear on this map except by that portal to which the Downer line runs. (Witness marks letter "c" on the plat to indicate southeasterly work.) Then

(Testimony of J. W. Dunfee.)

I raised about 12 feet into the vein, on the incline, then drifted about 8 feet in the vein up there in that cross-cut, and then at the end of that I raised up, and there is where I got the ore, about 8 feet. That was the first ore that looked like pay ore that I got after I took the second lease. I did this working there alone, this gopher hole. It was afterwards that I employed men to muck and they mucked out, and I drove a drift under this other work. I went ahead with the work, kept on drifting southeast, underneath the work I last described on the map, about 130 feet all told. That took me to the end of the cross-cut as indicated on the map. That is 130 feet from where I commenced near the Orleans Mining & Milling Company stope. That is 130 feet from the Downer line on the map. My first carload of ore brought in about \$234.00; it didn't pay; just able to buy my powder and gasoline and keep on working. I got out the first carload of ore about the middle of April, 1921, and then I gave an option to the Tonopah Mining Company and we didn't do any work for about three weeks. I spent all the time then sampling the mine, and running the hoist, while Mr. Carper, who represented the Tonopah Mining Company, and the force of men were sampling the mine. I do not know where Mr. Carper is. He was in Utah the last time I heard from him. The Tonopah Mining Company spent about five weeks all told sampling the property. They sampled it in ten-foot blocks; where there were indications of ore, took some 334 samples. This was

(Testimony of J. W. Dunfee.)

in order to see whether [217] or not they would purchase the property. Their work took into about the middle of May, 1921. After they told me they would not pay any money down for the property, I got my men together again and went back to work at my own expense, and I had no money to pay them, and I told them they had to take chances on the ore or my life insurance for this money and they all agreed to. I worked myself and continued working myself continuously until I sold out to Mr. D'Arcy. After I got in where I began to take out ore I had 5 or 6 men. I shipped about \$5,000.00 worth of ore before I closed with Mr. D'Arcy. This ore netted me about \$5,000.00, the ore I shipped, but it didn't pay out all bills and back things I owed for operating the mine on my own account. I was still in debt about a \$1,000.00 when I sold to Mr. D'Arcy. I did not at any time after closing down the lease of the Orleans Mining & Milling Company, or before its closing down, practice any concealment of any kind toward Mr. Terwilliger or anybody connected with the company. There was large publicity attached to the work I was doing in the spring of 1921. The "Goldfield Tribune" was publishing large and conspicuous articles about the mine and the new find, and of the mining deals, that people were trying to get options. They got information for those articles from people that came to Hornsilver to look at the new find I had made; they had thought the camp was dead, and they came in sometimes fifteen cars a day, to look at the showing. I did not tell

(Testimony of J. W. Dunfee.)

Mr. Terwilliger and his wife, or either of them, at Hornsilver, "just leave this to me and I will make you all rich."

Q. When you took this lease of June 5, 1920, what did you think as to whether or not Mr. Terwilliger had abandoned the enterprise?

Mr. STODDARD.—Object on the ground that it is incompetent, irrelevant and immaterial as to what he thought about it; it would not be any evidence and would not be binding upon Mr. Terwilliger [218] or those that he represents; it would be a mental process uncommunicated to anybody.

Mr. TILDEN.—He is charged with fraud, and I think we have a right to purge him.

The COURT.—It does not seem to me that is a very material matter, but I will let you put it in subject to the objection; the fact he thought they had abandoned it would not change the rights of the various parties in any way that I can see.

Mr. TILDEN.—Well, answer it subject to the objection.

A. Yes, I certainly thought they had abandoned it.

Q. What reason had you to think that?

A. From the letters that had transpired between us, and I told him he could get a lease, and he would not come up, we had to see Mr. Edwards first, and show him we would be able to work the property.

Q. Was there ever any discussion between you and him as to what you should do and what he should do in the enterprise? A. Yes, sir.

(Testimony of J. W. Dunfee.)

Q. What was it?

A. He was to finance it, and I was to look after the mine; I was to find the ores.

Cross-examination by Mr. STODDARD.

I saw a good deal of Terwilliger in Rawhide; we lived and batched together in the same tent for about a month. We were very good friends. My meeting with him in Los Angeles at the time this deal was made was accidental. I knew he was living there. After entering into the contract with him I returned to Hornsilver. The property operations of the Orleans Mining & Milling Company commenced some time in September, 1916. I was the president of the company, its general manager and acting treasurer, and one of the directors. I was the treasurer designated by the board of directors. [219] Mr. Edwards didn't want to act as a director, and we put him in to act temporarily until we got organized, in September, and then when Mr. Terwilliger came up in January we induced him to continue on in that capacity. Mr. Terwilliger's first appearance in Goldfield was in January, 1917. Mr. Edwards told us that he would have to act first for his company, and when there was any trouble came up he would have to take his company's part, and at all times could not act in our favor maybe, and we told him we would take our chances on his honesty to give us a fair deal. That conversation occurred in Edwards' office between Mr. Terwilliger, Edwards and myself in Goldfield.

(Testimony of J. W. Dunfee.)

(Letter is identified by witness, heretofore marked Plaintiff's Exhibit No. 17, and read by counsel:)

PLAINTIFF'S EXHIBIT No. 17.

"GOLDFIELD HOTEL,
Goldfield, Nev.

Sept. 15, 1916.

C. A. Terwilliger,
Los Angeles.
Friend Call.

I haven't received the stock books yet. E. Carter Edwards Attorney at Law will act as sect. for our Co. He is a attorney at law and will come in handy and is square. Hope success to you as I feel like we both made a deal where we will clean up a bunch of money. Will have maps and reports made first of week next.

J. W. DUNFEE."

The WITNESS.—(Continuing.) Mr. Edwards said he would act for us till we got going, till we got our money, to see whether we got this money that Mr. Terwilliger was to put up, he would act on the board. A thousand and one shares of the Orleans Mining and Milling Company stock were issued to him so he could act as a Director of the company. I was in Goldfield in September 15, 1916, the date I wrote that letter, and had a talk with Edwards on that date [220] about his acting as secretary. I did not issue him a thousand shares of the treasury stock on that day. I never

(Testimony of J. W. Dunfee.)

remember signing the certificate; I remember signing certificates, and Edwards getting the stock.

(Witness is shown stub in stock-book for Certificate No. 69, showing the issuance of 1,000 shares to E. Carter Edwards on September 20th, 1916, and that the shares were transferred from the treasury stock.)

The WITNESS.—(Continuing.) I signed that certificate. I was also treasurer of the company at that time. I did not as treasurer receive any consideration for that 1,000 shares certificate. This must have been filled out by Mr. Terwilliger in Los Angeles because that is his handwriting; the books were sent back to me.

Mr. TILDEN.—Counsel has consented that I break in at this time; I forgot to ask Mr. Dunfee about the surrender of the second lease.

Q. There were three leases altogether were there not, Mr. Dunfee? A. Yes.

Q. One under the Leasing Company, one you took June 5th, 1920, and then the one of January 1, 1921; now what did you do with the lease of June 5, 1920?

A. Why, I surrendered it, turned the lease in to Judge Edwards about October, 1920.

Q. Why?

A. Because I could not keep up my sixty shifts a month any longer, I handed back the lease.

Q. How did you come to enter into the lease No. 3, the one of January 1, 1921?

(Testimony of J. W. Dunfee.)

A. At his solicitation that I go down and try it again; so I told him that I would go down and do about 70 feet of work, and see whether I wanted the lease or not; we didn't draw up the [221] lease; so I went down—

Q. And that is the 70 feet of work you have described?

A. Yes. So I went down and went to work all alone to do that 70 feet.

Q. That is how the lease came to be dated back as explained by Mr. Edwards? A. Yes.

Cross-examination Resumed by Mr. STODDARD.

The red line drawn on the plat by Mr. Downer indicates where the Orleans Mining & Milling Company quit work. Referring to the 600-foot level all of the work lying east of the Downer line was done by the Orleans Mining & Milling Company up to the point about 187 feet from the Dunfee shaft. I worked on this property in some capacity or other since 1913. It was owned by the French Company. I do not know the principal shareholders of the French Company. I did not have friendly or confidential relations with the owners during the time that I was upon that property. I did not know any of them except a Mr. Charra, who came there and stayed about a month and a half. I was employed to go upon the property by Mr. Charra who was one of the owners, but he was dead at the time I took the lease. He was the only one of the company that I knew. He died the first year of the war. I did not have any corre-

(Testimony of J. W. Dunfee.)

spondence with the French Company. I did not personally write or telegraph to Paris or to any representative of the company for a lease or an option. I took such matters up with Judge Edwards. I might have passed one or two letters of a friendly nature with them in the early fall.

Q. Did Mr. Edwards at any time subsequent to the 25th day of July, 1918, assure you that the lease, which would expire on May 31st, 1919, would be extended if you desired?

A. It would be extended if we would go to work, yes. [222]

Q. Did he make this a qualification?

A. Yes, sir, he did.

The WITNESS.—(Continuing.) It is not a fact that Mr. Edwards stated to me that that lease would be extended, or gave me his verbal assurance that it would be extended, regardless of whether or not I went to work, until May 30, 1920. Mr. Edwards did not at any time during the latter part of 1918, say or represent to me that the excess shifts performed by the Orleans Mining & Milling Company would be credited on an extension of the lease. I testified on direct examination that in the fall of 1918 there was not much ore in sight; that I was at that time driving southeast on the 600 level in the hope of finding ore; I was driving southeast right up to the 6th day of October, 1918. I had hopes of striking a rich body of ore; that was why I was driving a drift. The location at which I did strike a rich body of ore in the spring or early

(Testimony of J. W. Dunfee.)

summer of 1921 was the extension of this drift, in the same direction I was then going. I drove 44 feet further in that drift before I got good ore, shipping ore. The statement in Plaintiff's Exhibit No. 3 which is a statement signed by myself as president and Mr. Terwilliger as vice-president and Mr. Edwards as secretary, "the present prospects of the mine are good, as on the 600-foot level after encountering some rather bad luck in the 400 and 500 foot levels in finding a leached-out condition and ore of so low a grade as hardly to bear treatment under present conditions, we have uncovered a fine body of ore running from \$45.00 to \$50.00 per ton in the better class of it, with a large amount of ore of \$15.00 to \$25.00 per ton," is true. It is also true, as I have heretofore stated, that the rich ore referred to in this statement was extracted by me between August 1st and the 6th day of October, 1918, when we closed down. I removed all of that ore that I could remove at a profit by underhand stoping it. I also extracted at the same [223] time what I referred to in this statement as the larger amount of ore of \$15.00 to \$25.00 per ton. All of it was extracted except in the bottom of the winze.

Q. Then there was still evidence of the larger amount of lower grade ore, is that true?

A. There was still some ore in the bottom of the winze.

The WITNESS.—(Continuing.) As to mining conditions at that time, referring to the fall of

(Testimony of J. W. Dunfee.)

1918, labor was very poor. It was difficulty to get satisfactory or competent labor at all. Such labor as I could get was very high. I was paying \$5.00 and \$5.50 a day at that time. That was more than I had formerly paid. All of the operating expenses were much higher in the fall of 1919 than at any time previous. That is not the reason why the property closed down. The reason was that we had no more finance to work on.

Q. And the reason you didn't have any more finances was on account of the difficulty in financing any mine property at that time, wasn't it?

A. Difficulty of financing, and had no more ore to ship.

Q. Isn't it true that it would have been a sacrifice of the low-grade ore to attempt to work it under those conditions; in other words, isn't it true, if you had been able to go ahead and take out the low-grade ore, that your return would have been much less than if you had waited until conditions had been stabilized and normal?

A. There was no ore I could muck at that time, muck up in the mine and pay operating expenses.

Q. Referring to your report, signed by yourself as president or general manager, dated November 6, 1918, and addressed to the stockholders and C. A. Terwilliger, I call your attention [224] to the third paragraph of the statement where you say: "would recommend sinking shaft to 700-foot level to get in new body of ore"; now what body of ore did you refer to?

(Testimony of J. W. Dunfee.)

A. I referred to the ore in what I called the winze stope on the 600.

The WITNESS.—(Continuing.) This winze stope is not the southeasterly drift. That drift was in a drift where we had turned and gone north, where we cross-cut over to the vein, and turned and went north, drifting north with reference to the Dunfee shaft on the 600. It was almost directly over the Dunfee shaft. At the time I closed down the body of ore I refer to was remaining in the property, in the west drift on the 600-foot level.

Q. Calling your attention to that statement where you said: "The visible ore in the mine except as above indicated has been pretty well *well* worked out in the different levels; and the success of the mine in the future will require proper development to disclose the ore bodies that diligence and perseverance will no doubt discover." What ore bodies did you have in mind or the possible or approximate location of ore bodies, that diligence and work would discover at that time?

A. That is when I recommended the sinking of the shaft; I had in mind by sinking this shaft to get under this ore on the 600, what I called the under-hand stope on the 600, that is why I recommended sinking the shaft for that body of ore.

Q. Do you know why that recommendation was not followed?

A. There never was any money to do this work.

Q. And the reason you could not raise the money

(Testimony of J. W. Dunfee.)

was on account of the financial conditions of the whole country at that time; is not that correct?
[225]

A. There was never any money raised to go to work; the lease expired.

The WITNESS.—(Continuing.) I was not in Goldfield at any time during the period that Mr. and Mrs. Terwilliger testified as to having been there from the 31st of July to along about the 4th of August, 1918. I am positive of that. As to whether I was in Goldfield during the latter part of July or any time near the dates mentioned, I don't remember; I would drive in and out at night. Many times I have driven into Goldfield, remained a few hours, and driven right out again; many evenings. I did see Mr. and Mrs. Terwilliger at Hornsilver during that time. It was just as the shift was going off. I was coming from the mine and saw a car drive up and stop at the office. Mr. and Mrs. Terwilliger and Judge Edwards were in the car. We all shook hands and spoke of the mine. I told them of the work I was pushing to get done. I talked of the operation of the mine and Mr. Terwilliger informed me it was late and he had to make Big Pine that night. They stated that their purpose in coming there was to get the report made out at Goldfield signed. They had a copy with them. I think Mr. Terwilliger handed it to me, and I read it. My action showed that I did not exactly approve of it, and Judge Edwards asked Mr. and Mrs. Terwilliger to let him have a talk with me about it.

(Testimony of J. W. Dunfee.)

That was in the office. Mr. and Mrs. Terwilliger stepped out and Edwards and I talked there and we went ahead talking of this matter and other matters. Just a few words was said about this report. He said this will be the best policy, he wants to show it to the stockholders, and wants you to sign it, and I signed it, and Mr. Terwilliger came in and took it. He didn't state what would be the best policy. I read the statement before I signed it. I noticed in it the following: "The Owing Company has given its consent in writing directing Mr. E. Carter Edwards [226] to extend the lease for another year, that is to June 1, 1920, which will be done." I read that. Nothing was said by Mr. Edwards to me while we were alone in the office about the extension of the lease—not a word.

Q. As a matter of fact, did you question or doubt the fact that the lease would be extended?

A. I knew it would be if we kept working.

Q. Now you knew when you signed this statement on August 1st, 1918, that the company didn't intend to work, didn't you?

A. I don't think I did know; I thought we were going ahead and work as long as we could; I knew if we ran out of money we would have to quit, but I was in hopes of finding ore to keep on working.

Q. Didn't you in this declaration to the stockholders signed by you state that the company was going to close down, or words to that effect?

A. If the mill closed; yes.

(Testimony of J. W. Dunfee.)

Q. Let me call your attention to this statement, after referring to war conditions: "It is easily seen, that the present *is* not the time to enlist capital for any other than a government or war purpose, for we must be patriotic above all other things and first help the Government to win the war. This is our slogan." Now, wasn't it the intention at that time to close down the property of the Orleans Company?

A. It was not the intention, sir, regardless of what that says.

Q. Is this statement true? Are all the statements contained in this statement true?

A. It is practically true; it was the slogan of the company; it was got up by Mr. Terwilliger and Judge Edwards; I wasn't present, knew nothing of it until they showed it to me. [227]

The WITNESS.—(Continuing.) The statement covered the situation. The statements with reference to the mine are all true. I see nothing wrong with it. There in regard to where the company had always paid their bills, I had always assumed that responsibility myself; everything was left to me; that was one statement that was not true. I had to pay the bills that the company was short, had to make good any work, bad work that was done; I was standing personally back of the company. Once or twice I had to make bills good. Those payments were refunded to me except the last. Several letters, four or five, were exchanged between me and Mr. Terwilliger in 1919 and 1920. I think that all with the exception of two have been introduced in

(Testimony of J. W. Dunfee.)

evidence here. I didn't make a copy of the letter that I wrote in April, 1919, to the effect that we would have to go to work or the Orleans Company would have to go to work to preserve their lease. The substance of that letter was that Judge Edwards would cancel the lease unless we went to work on June 1st, 1919. That letter was written in April, 1919, or May, right in there. I don't remember what else I said in that letter; it was notifying him that we must go to work is all, and the reason why we must go to work. That letter was not written in reply to any letter from Mr. Terwilliger but was written by notification by Judge Edwards; I met the Judge that day, and he told me that we had to go to work. That conversation was in his office at the time I wrote this letter to Terwilliger either in April or the first of May. At that time Mr. Edwards said that he wanted to know why we were not getting to work, wanted us to go to work on our lease, and he said, "I will have to cancel"—he said, "I will let the lease run out, the lease will run out on that date unless you get to work"; that was about the effect of the talk. That is why I wrote a letter to Mr. Terwilliger; Judge Edwards asked me to notify him, or I don't know whether he [228] asked me to notify him either; but he was telling me that he had heard from Mr. Terwilliger. Mr. Edwards told me of a letter to be written to Mr. Cooke regarding this suit prior to March 16, 1922. I had that conversation I guess in April, 1922. I have read that letter since then. Mr. Edwards discussed it with me be-

(Testimony of J. W. Dunfee.)

fore he sent it. The letter that I wrote Terwilliger warning him that we would have to get to work was not in answer to a letter already in evidence dated April 9, 1919. I received the latter letter but had already answered it. I had answered all letters he wrote me. I knew when I wrote that letter that Mr. Terwilliger had requested me to get together with him or meet him in Los Angeles as to the financing of the company. He had requested me in one letter to come. I also wrote a letter under date of March 2, 1920, to Mr. Terwilliger which has not been introduced in evidence. I wrote and told him we could get a lease, but didn't tell him for how long, or the terms, or anything of the kind. That was about all, and for him to come up. I had a conversation with Mr. Edwards about a new lease. This first letter was an answer to Mr. Terwilliger's letter; then after I had a talk with Edwards, without waiting for another letter, I wrote Mr. Terwilliger a letter March 26th, I believe the letter showed it, I don't remember the dates, telling what kind of a lease we could get, 2½ years and 20%. That is the letter of March 26th in evidence. I had no conversation with Mr. Edwards prior to March 2d about the extension or renewal of the lease. He said he thought if we could get money, he would think favorably of a new lease. Later on I had a talk with him and he informed me what he would do and I notified Mr. Terwilliger in the March 26th letter. It was in March, 1920, that I talked with him about the new lease. I hunted him up and

(Testimony of J. W. Dunfee.)

showed him a letter from Mr. Terwilliger written the last days of February. I could not promise Mr. Edwards anything, that we could [229] really get the money to go ahead, so he said if we had any money to go ahead with the lease, he would not mind granting a new lease; so I wrote Mr. Terwilliger and told him to come up, and we would have a talk with Mr. Edwards, and assure Mr. Edwards what we could do, and he would give us a new lease. He would give us a 2½ year lease if we would go to work doing sixty shifts a month, something like that; we had to get to work on the property, but he would not give us a lease unless we went to work, and it was financed. I knew that Mr. Terwilliger had written me letters asking me to come to Los Angeles. I did not want to start on an entirely new basis, just take the old company and go on. What I meant in my March 26th letter when I said, "Do you think you could take the old company and get money by selling stock to work it; we would start out on a new basis; I got wise to the stock game," was for him to go out and sell stock to help the property.

Q. What did you mean by "start out on a new basis, I got wise to the stock game"?

A. I had always made my effort to make mines pay that I worked in; I found out that the stock game that Mr. Terwilliger was playing was the best place to make the money; I had never been in the game before, I always made mines pay when I worked them.

(Testimony of J. W. Dunfee.)

Q. What sort of new basis did you want to start out on, that you refer to in this letter?

A. Let Mr. Terwilliger go out and sell stock.

Q. Was that a new basis?

A. Well, that was the old basis.

Q. I am asking you what you meant by starting on a new basis?

A. Perhaps not to put every dollar in the mine, like I had always worked; I would let him have money to go sell [230] stock, which he had always requested of me; that is what I meant by new basis—let him go out in New York and sell stock.

The WITNESS.—(Continuing.) In December, 1918, I went to California and then to Divide in 1919. First went to Divide in January, 1919. I was not on the Orleans property until June, 1920. I first had a conversation with Mr. Edwards about the June 5th, 1920, lease on May 2d. I had a conversation in regard to Mr. Terwilliger not responding. I base that statement on the contents of the May 2, 1920, letter. Edwards and I were talking that over, that he would not come up. We discussed the fact that he thought Mr. Terwilliger would not be up, and when I asked him to come up we could not get a lease unless he came up and agreed to finance it, that Edwards would not give us a lease, that he could not give a lease unless Mr. Terwilliger arrived there and assured him we would go to work and do development on the mine, and we discussed that letter in that light. I don't remember anything further about that conversation.

(Testimony of J. W. Dunfee.)

Q. Was there anything said about your getting a lease on that property?

A. He stated that he would give the lease to anybody that wanted it; I don't remember anything said to me.

Q. Didn't you ever have a talk with Mr. Edwards prior to the June 5th, 1920, lease about the giving of that lease?

A. Yes, he stated he would give a lease to any party that wanted a lease.

The WITNESS.—(Continuing.) Our conversations all happened after Mr. Terwilliger would not come up on that lease; we had several conversations there. The conversation about the June 5th, 1920, lease was around the first of June. Mr. Edwards said that Mr. Terwilliger wasn't going to do anything and he said, "Why don't you take a lease and go out there?" That was practically all that [231] was said, that was the main conversation, and we discussed if I thought *if I thought* I could find ore. After I went upon the property after the June 5th, 1920, lease, I operated for two or three months altogether at my own expense. I then left the property and did some work at Log Springs; first went to Los Angeles in September, then came back and worked a month or two at Log Springs for wages and went back upon the property after that. Then I went to Candelaria and did my location work there and didn't go back to the property until January 2d, 1921. Then I worked on the property off and on from January 2d, 1921, until July 18th, 1921,

(Testimony of J. W. Dunfee.)

the date I entered into the contract with Mr. D'Arcy. During all that time my gross expenses amounted to about \$5,000.00 or \$6,000.00, in mining and operating that property. Then credited against that amount is the net amount of \$5,000.00 which I received from the shipments of ore.

Q. Now, what conversation, if anything, did you have with Mr. Edwards on or about January 1st, 1921, relative to the lease of June 5, 1920?

A. I turned in the lease in October of that year; turned it back, handed it back in the office, and Mr. Edwards says: "Why don't you go out and try the Orleans again?" and I said, "I have no money and could not do my sixty shifts, but I would like to do some work anyway"; he said, "You go out and do this work, and if you strike anything I will draw you up a lease"; so I went out there and I worked two months and fourteen days all alone in the shaft. Then I struck some ore and employed help. When I struck the ore I had this lease of January 1st, 1921, drawn. When I went to make the sale to the Tonopah Mining Company I wrote, they wanted to see the lease, and I wrote to Judge Edwards to send me out the lease, and he mailed it to me. The lease of June 5th, 1921, was endorsed, "Cancelled on January 1, 1921," I told him I would not work [232] under that lease. The endorsement upon that lease was actually made on January 1, 1921, the day before I left to go to the mine, and I told him I would not work under that lease, and he said he would

(Testimony of J. W. Dunfee.)

give me any lease in my name if I would only go out and go to work on the mine, that no one else would take it. During all the times mentioned in this proceeding, I knew Mr. Terwilliger lived in Brawley, and I knew he moved to Los Angeles in May, 1920, by letter. I did not know his residence number in Los Angeles. I could have located his place of residence if I had so desired. I visited his home a long time ago, in 1908. I was in Los Angeles at the time this contract was drawn, not at his home, at the hotel.

Mr. TILDEN.—If the Court please, Mr. Cooke wants to examine, and I want to ask one more question on direct.

The COURT.—You may ask.

The WITNESS.—(In answer to Mr. TILDEN.) At the time I went to work on the lease in June, 1920, the equipment was badly wrecked, not much left. The engine-room had no roof on it.

Mr. COOKE.—We object as incompetent, irrelevant and immaterial.

The COURT.—I don't myself see where it has any bearing, but if you want it in, it can go in subject to the objection.

Mr. TILDEN.—When I get to it, it will show some thousand dollars was paid to restore it.

The COURT.—It will go in subject to the objection.

The WITNESS.—(Continuing.) And part of the engine had gone; the spark-plugs and the exhaust-head of the engine was gone, the gasoline-

(Testimony of J. W. Dunfee.)

tank had been taken, and also the water-tank was taken, and also the foundation to the water-tank was gone; the [233] forge and blacksmith tools were all gone; no blower. I restored them all. With respect to the condition to the shaft, where I had taken out that last, especially the last two days, had caved in, and I had to catch that all up before I could get down to the shaft, to the 300. It cost about a \$1,000.00 to do all that work, to get the shaft in shape and get into the mine again. I spent that in June, 1920, and then had only about \$200.00 left for operations on the mine. I have the checks showing the amounts paid to Mr. Terwilliger. They total \$920.00, and then 200 shares he sold to Mr. Winkler who paid \$100.00; makes it \$1,020.00. The money represented by these checks embrace all the moneys due Mr. Terwilliger, except the Winkler account. About \$500.00 of this was advanced for several trips to Goldfield from Los Angeles made by Mr. Terwilliger to attend meetings. There was one of \$500.00 for a trip he made thru California trying to sell stock.

(The checks are admitted in evidence, subject to plaintiff's objection, marked Defendant's Exhibit "L," and are as follows:) [234]

DEFENDANT'S EXHIBIT "L."

94-16.

No. ———.

JOHN S. COOK & CO., BANKERS.

Goldfield, Nevada.

Goldfield, Nevada, Feb. 15, 1917.

Pay to C. A. Terwilliger or order.....\$100.00

One Hundred no/100Dollars

Trip to Goldfield.

J. W. DUNFEE,

Pres. Orleans M. M. Co.

[Endorsed]:

C. A. Terwilliger. (Paid.)

94-16

No. 47

(N. P. 16-1)

JOHN S. COOK & CO., BANKERS.

Goldfield, Nevada.

Goldfield, Nevada, April 17, 1917.

Pay to C. A. Terwilliger or order.....\$100.00

One hundred no/100Dollars

ORLEANS M. & M. COMPANY.

By J. W. DUNFEE,

Not over One Hundred

President.

\$L00\$

(On Margin:)

Trip to Goldfield.

Orleans M. & M. Company.

Mines at Hornsilver, Nevada. (Paid.)

[Endorsed]: C. A. Terwilliger.

Pay to the Order of any Bank or Banker Apr. 26, 1917.

Farmers & Merchants National Bank. 18-1. Los Angeles, Cal.

Pay to the Order of any Bank, Banker or Trust Co. Prior Endorsements Guaranteed Apr. 25, 1917.

American State Bank. 98-820. Brawley, Cal. 90-820. W. M. SMITH, Cashier.

94-16

No. 70

JOHN S. COOK & CO., BANKERS.

Goldfield, Nevada.

Goldfield, Nevada, May 11, 1917.

Pay to C. A. Terwilliger or order.....\$200.00

Two Hundred no/100Dollars

ORLEANS M. & M. COMPANY,

By J. W. DUNFEE,

President.

Not Over Two Hundred

\$ 200 \$

(On Margin:)

Expense.

Orleans M. & M. Company,

Mines at Hornsilver, Nevada.

[Endorsed]: C. A. Terwilliger. [235]

94-16

JOHN S. COOK & CO., BANKERS.

Goldfield, Nevada.

Goldfield, Nevada, May 16, 1918-No. —

Pay to C. A. Terwilliger or Bearer.....\$500.00
 Five hundred no/100Dollars

ORLEANS M. M. CO.

By J. W. DUNFEE,
 Pres.

Expenses. (Paid.)

[Endorsed]: C. A. Terwilliger.

94-16

JOHN S. COOK & CO., BANKERS.

Goldfield, Nevada.

Goldfield, Nevada, May 18, 1918.

Pay to J. W. Dunfee or Order.....\$20.00
 Twenty no/100Dollars

ORLEANS M. & M. COMPANY.

By J. W. DUNFEE,
 President.

Money lent to C. A. Terwilliger cash.

Orleans M. & M. Company; Mines at Hornsilver,
 Nevada. (Paid.)

[Endorsed]: J. W. Dunfee.

M. W. Mitchell.

Cancelled Checks *advanced* to C. A. Terwilliger by
 J. W. Dunfee.

Feb. 15th-1917.....	\$100.00
April 17th-1917.....	100.00
May 11th-1917.....	200.00
May 16th-1918.....	500.00
May 18th-1918 cash.....	20.00

Total.....\$920.00

To John Winkler \$100.00 (For selling stock.)

(Testimony of J. W. Dunfee.)

Cross-examination Resumed by Mr. COOKE.

Q. You said in your direct examination, as I recollect, that the last lease of the Orleans Mining & Milling Company had on this property expired May 31st, 1919? A. The judge cancelled it; yes.

The WITNESS.—(Continuing.) I don't know how he cancelled it; he told me we had to get to work, that he would cancel the lease unless we went to work on that date. In a talk with Mr. Edwards prior to May 31st, 1919, he notified me we would have to go to work, or he said that he would let the lease run a few weeks, and we must be to work at that time. If we didn't go to work we would cancel the lease. I do not remember how many of those conversations I had with him prior to May 31, 1919; maybe at various times. Every time I received a letter from Mr. Terwilliger I took it up and had a conversation with the Judge. These conversations occurred in his office. In April, 1919, and then we had a discussion in January, 1919. The discussion in April, 1919, was in the latter part of the month, which time I fix from correspondence I remember coming up here in evidence in regard to some of Mr. Terwilliger's letters asking me to come to Brawley. I think it was an earlier letter than May 2d. I don't recall that he asked me in an earlier letter. It was just before or after receiving the letter asking me to come to Brawley that I had the talk with Mr. Edwards in his office, along that time. The Judge and I were alone. I brought the letters in; he was asking me when we were go-

(Testimony of J. W. Dunfee.)

ing to start up, and I said I didn't know if we were going to do any work, or what I heard from Mr. Terwilliger. I can't recall what letter it was that I showed Mr. Edwards. Edwards told me he would let the lease run till the first of June, 1919, and unless we started by the first of June he would cancel it. He also told me to notify Mr. Terwilliger to that effect. I did so notify Mr. Terwilliger [237] by letter along in April, 1919. That letter is not in evidence; I don't know where it is. I wrote it in long hand; I never kept copies of my long-hand letters. Wrote it in Goldfield. In it I told him that he knew our lease called for sixty shifts as well as I did, and unless we got to work the Judge would cancel the lease the first of June. I had the January, 1919, talk with Judge Edwards in the same place, his office. At that time the talk was principally in regard to letters Mr. Terwilliger had written me. He had written me a letter that he would cause me a lot of trouble, threatened to cause me trouble. That letter is not in evidence, I think I destroyed it. I got it along in January, showed it to Mr. Edwards and he answered it on the typewriter for me. The copy is in evidence. At that January conversation the subject of terminating the lease didn't come up. From the time of the April, 1919, conversation up to May 31, 1919, he talked of it a time or two later. It was about a month or two later, in his office. I can't fix the date any nearer than that—April or May. I know I gave him plenty of time; I notified plenty of time

(Testimony of J. W. Dunfee.)

so he could. I don't remember the subsequent conversations distinctly; various conversations came up about it.

Q. On the occasion of either of those conversations do you know whether this writing (referring to written memorandum on the lease, Plaintiff's Exhibit 2) was put upon this lease.

A. No, I don't; I don't know when that was put there.

The WITNESS. — (Continuing.) Judge Edwards put it there, I presume; that is his handwriting; I never saw that lease afterwards until we came into court, until this litigation was brought. The leases, from, say, June 1, 1920, down to the time when suit was brought were in the office in Goldfield, Judge Edwards' office. He was Secretary and kept the papers. I kept those among my private papers in his office. This paper ceased to be among my private papers in June, 1919. I didn't surrender the lease, [238] Nothing was being done with the property of the Orleans Company covered by this lease from June 1, 1919, to June 1, 1920; I was not on that property between those two dates. There was no machinery or personal property left there on May 31, 1919. The Orleans Company had no machinery. The French Company owned the machinery on the ground. It was covered by the lease and used by the Orleans Company. Between the dates mentioned nobody looked after it for our company. There was no one there representing the company or looking after the property at all.

(Testimony of J. W. Dunfee.)

There was someone there acting under the instructions of the French Company through Mr. Edwards. I don't know whether or not the French Company did anything with that property or were mining upon it or the like between the dates mentioned. As far as I know they didn't. In 1920, after a letter from Mr. Terwilliger in the last days of February, Edwards offered the company a more favorable lease. I first answered the letter telling him I didn't know what I could do but would see Edwards; and then after I had a talk with Edwards, he offered a two and a half year lease, said he would be able to give us a two and a half year lease, but we had to give him the assurance we were going to work. I wrote Mr. Terwilliger a letter about our conversation. As to when that two and a half year lease was to be given, I was supposed to start right in. I told Mr. Terwilliger to wire or write at once, begin at once so we could get action. The lease was also more favorable in the respect that it would provide for a 20% royalty. In my talks with Edwards in the preceding spring he would not give me as long a lease, but the same royalty less than the royalty that was provided by the lease when the Orleans Company had it, which was 26 $\frac{1}{4}$. When I was in Los Angeles in 1920, it was in September, the first part of September, I can't fix it definitely. I was there about three weeks, in Los Angeles all the time. I was dealing with a man by the name of Laughlin trying to form a consolidation of [239] properties. Fail-

(Testimony of J. W. Dunfee.)

ing in that I came back in October, 1920. It was in the last days of that October that I delivered the June 5, 1920 lease back to Edwards. That was after I failed to do business with Mr. Bettles; he would not take the property and I wasn't able to do my sixty shifts; so I went in and gave the lease back; it was too short a time; there were a lot of conditions he kicked on. I am sure it was not in the month of December, 1920, that I delivered back that lease. I am sure it was not December 20, 1920. When I handed that lease back I didn't have any promise from him of a new lease. The subject of whether I could or could not get a more favorable lease was not discussed between us before I handed back the June 5, 1920, lease.

Q. At the time you handed it back, whether October or December, 1920, you hadn't any thought of getting another lease on the property?

A. I had not a dollar in the world to work it with, so I had no idea.

Q. You had no idea of getting another lease, or anything further with the property? A. No, sir.

TESTIMONY OF E. CARTER EDWARDS, FOR DEFENDANT.

E. CARTER EDWARDS, called for defendant, duly sworn, testified as follows:

Direct Examination by Mr. TILDEN.

Referring to statement in August 1, 1918, report Plaintiff's Exhibit 3, "the Owing Company has

(Testimony of E. Carter Edwards.)

given its consent in writing directing Mr. E. Carter Edwards to extend the lease for another year that is to June 1, 1920, which will be done," I never as a matter [240] *effect* extended that lease because the mine shut down soon after that. Referring to the conversation with Mr. and Mrs. Terwilliger leading up to the writing of that report, Mr. Terwilliger in the afternoon came in to see me about an extension, came by himself first, and we had a talk over the matter and he wanted an extension he said for another year; and we talked over the present condition of finances in the company, and how he had attempted to finance it, and how his last attempts had failed, and how much more difficult it was to finance the proposition under war conditions, and he said, "I think you should give us an extension." I said, "Owing to the conditions I want to be absolutely fair with you people, and to give you every opportunity to make a success of this lease, and I will grant you another extension. I want everything to be in writing that I do in connection with this mine or lease and I will draw up the papers this afternoon or evening, and you come around to-morrow and I will submit it to you." There was nothing said in that conversation about applying past work on the requirements of future work. He came around the next morning and I submitted the paper which is the August 1, 1918, report, and I read it over to them—he brought his wife with him the next time—and said, "Does this paper fairly and sufficiently express our discussion

(Testimony of E. Carter Edwards.)

yesterday?" He said, "It is entirely satisfactory." I signed it and he signed it; then he said to me, "I wish you would go down to Hornsilver with me. I would like for you to explain this to Mr. Dunfee." Mr. Dunfee was not in Goldfield at that time. That was the object of my going to Hornsilver at that time—to see him. In this second conversation there was nothing whatever said about applying past work on future requirements. We went down to Hornsilver that afternoon. Mr. Terwilliger drove his own car. His wife went along. We saw Mr. Dunfee down there coming away from the mine and we went to the office building and waited for him to come up. We went into [241] the office and Mr. Terwilliger handed the report to him. He read it over and said nothing. I asked Mr. and Mrs. Terwilliger to leave the office temporarily so I could explain to Mr. Dunfee, and they did, and were out possibly five minutes, and I had a talk with Mr. Dunfee, read the report and explained it to him, called the Terwilliger's back, Mr. Dunfee signed the report and I handed a copy to Mr. Terwilliger. When Mr. Dunfee gave up the second lease, that is the June 5, 1920, lease, he said he was entirely out of funds, and he could not go on any further, could not perform the monthly shifts, could not keep his lease up. When he refused to take the third lease he gave as his reason for so doing that he had failed on the other, and the mining conditions were so hard, expenses so high, that the royalty was too high, and the lease was too

(Testimony of E. Carter Edwards.)

short a term, and he would not undertake anything on that.

Q. I don't think you understood my question. I mean after the terms had been discussed, did he give any reason for refusing to take the lease then and there?

A. Yes, he said that he wanted to examine the mine further, make some examinations, and do some preliminary work. He said he was very much discouraged and very much in doubt; he wanted to sample the mine to see if he wanted the lease or not. He said he wanted to see the property and examine it before he would bind himself again with a lease, and I gave him a verbal understanding that he could have it. I had to press on him the taking of the third lease. I wanted the property occupied and worked, and he was very much discouraged, and I pressed the matter on him, and agreed to give a reduction and another term and reduce the royalty. In the conversation with Mr. Dunfee and Mr. and Mrs. Terwilliger at Hornsilver there was nothing said about applying past work on future requirements. There was nothing said by Mr. Dunfee to the [242] effect that "you leave all this to me and I will make you rich."

Cross-examination by Mr. COOKE.

The lease that I refer to as the third lease was the one referred to as the January 1, 1921 lease.

Q. What did you say to him in regards to pressing him to take it?

A. Well, he had given up the other, and was un-

(Testimony of E. Carter Edwards.)

able to carry it on, perform the work on it, had no money, and that condition was talked about, and I said I wanted the property occupied and worked, and would like for him to go on and I would do anything I could to assist him that was reasonable; and he then spoke of the old lease that had been cancelled—the June 5, 1920 lease—and it was entirely unsatisfactory for any new operation. That June 5, 1920, lease was brought in in October, but I delayed cancelling it. I thought he might go on, and I gave him a chance. As to how I fix the time in October, I know he shut the mine down the latter part of August, is my memory, and he was around there, came in occasionally to Goldfield, and came to see me before he went away. I am sure it was in October but not of the date in October. I cancelled the lease that the company had been operating on the date recited in the cancellation_ written on the lease. I wrote that on there. If I didn't sign it I intended to, it is my writing. The date of the cancellation is the date of the expiration of the lease by its own terms. I intended to have my date of cancellation correspond with the date of expiration. I was cancelling the lease for nonperformance of the monthly shifts, cancelled it a day before it actually expired to exercise my right in that respect. Referring to the August 1st report and the statement "the Owing Company has given its consent in writing directing Mr. E. Carter Edwards to extend the lease for another year, that is to June 1, 1920, which will be done," I refer, in

(Testimony of E. Carter Edwards.)

using the word [243] "consent," to my own consent. In using the word "writing" I refer to my power of attorney—the general power given me to attend to their business, to sign and make and modify leases. I intended that report to go to the stockholders of the company and I intended to do just what I said there I would do on behalf of the company, extend the lease, on condition; I didn't write it on the back of the lease, but I intended to comply with that agreement. I have not changed my mind about it.

Q. Did you as the attorney-in-fact of the French Company expect this (report) to be an extension of and in itself, without anything further?

A. That paper was simply contingent and conditional on war conditions, as it states in the preamble there. I wanted to act with the utmost fairness, and give these people all the chance in the world to perform their contract, and if they wanted it they could come to me at any time and say we want to put it on the back of the lease, and if I was satisfied they would perform the contract with me I would have done it. I considered to make it an absolute extension there would be something further done.

Q. Is there anything in there (the report) which conveys to them (the stockholders) the information that they must apply for an extension if they want it? A. I don't think so.

The WITNESS.—(Continuing.) I did no acts to cut off the stockholder's rights until that paper

(Testimony of E. Carter Edwards.)

(the report) had expired, that is, until June 1, 1920. Then I exercised my right for the benefit of my company. The property was dilapidated, going into decay, and it would take thousands of dollars and I must, and I did, exercise my rights positively then in favor of my company. It would have been going on until now, and I wouldn't have had no mine. The property was being stolen, the stopes had fallen in. [244]

Q. You consider that the Orleans Mining & Milling Company under this paper, Plaintiff's Exhibit 3, had rights to the property until June 5, 1920?

A. I did, and I didn't violate any rights that they could have exercised up to that time.

Q. What kind of rights do you mean that you understood they had there up to June 1, 1920?

A. The right to operate that mine.

Q. Under the old lease? A. Yes.

Q. And that is why you didn't do anything towards protecting the French Company, as you put it, by putting somebody in charge there and working until June 5, 1920?

A. Yes, practically; I had warned Mr. Dunfee to communicate with Mr. Terwilliger, and to start it up, and I had offered to give another and new lease, two and a half years and 20% royalty, to do anything I could to get mining started. It was going a long time, the mine was getting in a bad shape and I would have taken Mr. Terwilliger and his company on a new contract if they had come up and made a showing.

(Testimony of E. Carter Edwards.)

The WITNESS.—(Continuing.) At the time of the visit to Hornsilver of Mr. and Mrs. Terwilliger about August 1, 1918, I did not say to them in substance, now you go down to Imperial Valley and tell the stockholders there not to worry over this property for their investment will be protected in every way. I let the paper (report) explain everything. That paper was intended for the stockholders; that is all I did. I sent no message by Mr. Terwilliger to the stockholders in Imperial Valley except that report and since that report I never sent any notice in writing to Mr. Terwilliger or to the stockholders in regard to the subject of the extension of the lease, or the cancellation of it. I gave notice to Mr. Dunfee, didn't put it in writing, [245] but I instructed Mr. Dunfee when writing to Mr. Terwilliger to inform him of my determination; they always conducted the conversation between them; I was only nominally a director, and I left them to attend to their own affairs, but I told Mr. Dunfee repeatedly to so inform Mr. Terwilliger.

(Three letters are identified by the witness, admitted in evidence without objection, marked Plaintiff's Exhibit No. 18, and are as follows:) [246]

PLAINTIFF'S EXHIBIT No. 18.

E. CARTER EDWARDS,

Attorney at Law.

Box 1137.

Goldfield, Nevada, March 28th, 1920.

H. R. Cooke, Esqr.,

Reno, Nevada.

Dear Sir:—

Excuse delay in answering your last, but I have had to go over to Tonopah, and divide my time among some other matters as well, which accounts for the same.

We give you the following information unconditionally, requested by you, as to the amount of the stock of the Orleans M. & M. Co., issued, outstanding, and to whom issued.

C. A. Terwilliger	.....	267,000	shrs.	Promotion
Geo. R. Drofflemyer	.....	4,000	“	“
Mrs. Geo. R. Drofflemyer..		2,000	“	“
J. L. Taecker	.....	6,000	“	“
H. P. Fites	.....	2,000	“	“
T. B. Shank	.....	4,000	“	“
G. J. Shank	.....	4,000	“	“
Albert Lackman	.....	6,000	“	“
Mrs. Jennie Robinson	....	2,000	“	“
John Robinson	.....	1,000	“	“
Melville W. Curn	.....	1,000	“	“
Tom Crawford	.....	1,000	“	“

300,000

J. W. Dunfee	300,000	“	“
C. H. Ellsworth	2,250	“	Treasury
E. Carter Edwards	1,000	“	“
John Winkler	200	“	“
<hr/>			
Total	603,450		

I wish to correct a statement made by me to the effect that I had only one share of stock. I was so impressed at the time of writing, but find 1000 shares in my name.

Will leave the matter to your good judgment as to how you use my letter and exhibits sent you.

Yours very truly,

E. CARTER EDWARDS. [247]

E. CARTER EDWARDS,

Attorney at Law.

Box 1137.

Goldfield, Nevada, March 20th, 1922.

H. R. Cooke, Esq.,
Reno, Nevada.

My dear Sir:

I have delayed a little longer than I desired to get before you all the facts, which the inclosed, is submitted to cover the whole situation. I had rather had a talk with you on this matter, but as that was not practicable, have tried to supply the facts, so that you will be put in an equivalent position as a conversation would have placed you.

We deny that I and Dunfee, ever kept from Terwilliger any fact that he wanted to know, or ever deceived, or tried to deceive him, and submit

the enclosures as the best evidence, from which you can draw your own conclusions.

Begging your pardon for the delay,
I remain,

Yours very truly,
E. CARTER EDWARDS. [248]

E. CARTER EDWARDS,
Attorney at Law.
Box 1137.

Goldfield, Nevada, March 16th, 1922.

H. R. Cooke, Esq.,
Reno, Nevada.

Dear Sir:

Pursuant to my promise contained in my letter under date March 12th, inst., I shall give you the facts fully regarding the Orleans Mining & Milling Co., and the business dealing had between Terwilliger, Dunfee and myself in operating the lease acquired by it from Dunfee, and the termination and ending of its rights over the mining property of Le Champ d'Or French Gold Mining Company, Limited, upon the expiration of the extension of it, and the failure of the Orleans Mining & Milling Co., or any one for it to seek an extension of it, after its said termination by expiration.

The lease was originally granted to J. W. Dunfee by Le Champ d'Or Company, by its Attorney in fact at that time J. Charra, the date of said lease being 19th day of June, 1915, and the term of the same ending May 31st, 1917, being for nearly two years. By two extensions of it the lease was extended as follows: By extension made February

25th, 1916, extended one year, to May 31st, 1918; by extension dated April 18th, 1917, one year, to May 31st, 1919. The two extensions were made by myself, who had been made Attorney in Fact upon the departure for France of Mr. Charra, in the fall of 1915, and I have remained such attorney in fact to the date of this writing. So when the Orleans Mining & Milling Co. was incorporated by Terwilliger and Dunfee, at Los Angeles, California, in September, 1916, I had charge of the affairs and business of Le Champ d'Or, Incorporated under the laws of Arizona.

My legal services were not engaged nor counsel sought in the organization of The Orleans M. & M. Co., but the services of some attorney in California, nor was I present at any meeting of its stockholders at its organization or otherwise in California, nor as well of its directors. It was the desire of Mr. Dunfee and Terwilliger at the incorporation of the Orleans M. & M. Co., to have my name proposed as a director, and I was consulted on that matter, and remonstrated at the suggestion and took the position that the duties of a director of the Company leasing and the Company Lessor, Le Champ d'Or, were inconsistent, and might require me to make choices that would not please those whom they might be against; but they did not think my objections conclusive and upon their request I was made the transferee of 2 shares of stock to qualify me, and at Phoenix in the organization process made a director. This is all the stock interest I ever acquired in the Company, and is how I became a director. I will add this, as you may sur-

mise, that they wanted me to steer them clear of the difficulties that they knew they did not have the legal knowledge to avoid, and their judgment in this direction proved true, as I was soon engaged in rectifying what to me were very grave mistakes in their manner of raising money by the sale of stock.
[249]

Before the organization, Dunfee and Terwilliger entered into an agreement providing for their respective interests in the New Company, be 50-50 interests, the amount of money to be raised to be \$8000.00, the time to be given to raise it—\$5000.00 first and the balance subsequently, \$3000.00 to go to Dunfee, the manner of paying expenses of organization, and advanced expenses of operation, sale of stock, etc. Inclosed find a copy of this agreement which we mark Exhibit "A." You may possibly have the same, but we send along for safety, a copy of the same.

The first meeting of the directors in Goldfield was held on January 15th, 1917, at my office, and I have the minutes of this meeting, at which the directors, Terwilliger, Dunfee and Edwards were present, and I was made Secretary, Dunfee, President, and Terwilliger, Vice-President. After this meeting on January 15th, 1917, and Terwilliger had left for California, Dunfee disclosed to me that Terwilliger had proposed to him and had insisted on its execution, a secret private agreement between Terwilliger and Dunfee to the effect that the first moneys realized from the development should be turned back to the stockholders who had paid

for the promotion stock of Terwilliger to raise the \$8000.00 mentioned in the original contract Exhibit "A," and that also Dunfee and Terwilliger should also be paid the sums of \$12,000.00 to Dunfee and \$5000.00 to Terwilliger in addition, for the purpose of indemnifying the stockholders who bought the \$8000.00 of promotion stock (32,000 shares at 8¢ per share) and giving Dunfee and Terwilliger, who were to own 50-50 of the promotion stock (300,000 each amounting to 600,000 shares, the Treasury being 400,000 shares) an unfair advantage and preference over the subsequent purchasers of stock whose sole work it was Terwilliger, to sell additional stock—in other words any possible profit they could receive as holders of stock purchased subsequent to this agreement, would be after all these preferential amounts had been first paid. Upon Dunfee's relation of this scheme to prefer the promoters over subsequent purchasers of stock, I pronounced it unfair, unjust, and a fraud on the rights of all stockholders becoming such subsequent to the execution of this agreement, and advised Dunfee that he and I must at all events, take up and cancel this unlawful agreement. We then (Dunfee and I) worked with this point in mind, that before we would license Terwilliger to sell any more stock, it would be upon his agreement and consent to rescind this unlawful agreement, and the stock being based on a lease which did not have a duration of quite 3 years (from September, 1916, to May 31st, 1919, the work being actually begun on it in the later winter of 1917) it was still

more unfair to begin complications of this character where the stock was based upon a lease only, as the expiration of the lease would turn the stock into mere paper, unless the lease was continued by extensions to preserve its life. My hunch had come true as I had secret misgivings as to Terwilliger's conduct, the same and his manner of talking and acting being rather that of an actor and impersonator, than a *bona fide* worker, being my impression of him.

To forestall the possibilities of selling stock with this agreement out and to turn the character of the future business to legitimate business, I advised Dunfee and Terwilliger that the Co. should purchase the property so that the stockholders would not suffer a loss of the value of their stock by a termination of the lease, and not to try to sell to persons of small means, but seek to enlist capital on a large scale, as such people would be much better able to take a chance on a mining deal, and if a loss occurred be able to stand it. For the purpose of encouraging the purchase [250] of the property so that the stock should have the solid basis of ownership, and also to avoid the dealing with persons of small means, I, as attorney in fact of Le Champ d'Or, offered to sell the property on an option to purchase the same by the Orleans M. & M. Co. for \$35,000.00 and strongly advised, supported by Dunfee, that sufficient stock be sold to one person if possible to consummate the purchase, for the reasons given. The result was that an agreement was made between Terwilliger and Dun-

fee bearing date the 25th day of September, 1917, in which the sale of 200,00 shares was agreed upon and the proceeds used to purchase the property, a copy of which is hereto attached and marked Exhibit "B." Terwilliger had a scheme in mind, and urged the adoption of it, of securing a permit under the Blue Sky Laws of California, by petition, to sell stock in that state, which he proposed to do by travelling over the state and selling in whatever amounts he could find purchasers for, which would mean that he was to deal with persons of small means, with the consequences already specified of an expiring lease, and the dissatisfactions which follow the small investor. The letter inclosed (copy) relates to the blue sky proposition. The letter is dated before the agreement marked Exhibit "B," and Terwilliger's discussions of this blue-sky proposition had been for some time before the date of the letter, and is marked Exhibit "C."

Before going further into the dealing on said agreement Exhibit "B," and the blue-sky proposition, I wish to give the full facts regarding the private secret agreement made on the 15th day of February, 1917. This agreement, for the convenience of Terwilliger, was made in two parts, 1st, the part that related to the stockholders who paid in the \$8000.00, and second the part that related to the \$12,000.00 and \$5000.00 respective that Dunfee and Terwilliger should receive, this for the purpose of Terwilliger's showing the same to the stockholders who paid the \$8000.00 and making them

believe that they were the preferred ones, without letting them know that he and Dunfee were to be profiteers as well, in order to make boosters out of them, and enable Terwilliger to sell them four times as much stock as they had already bought, and as well use them as boosters to sell large amounts of stock to their neighbors. Terwilliger in urging this agreement, gave as his reasons for its execution and adoption, the foregoing: to-wit: "That he could sell the said stockholders four times as much stock, and as well large amount to others in that vicinity," so Dunfee informed me. I enclosed a copy of this private agreement bearing date February 15th, 1917, and call particular attention to these facts connected with it, to-wit: That it was never suggested in a directors' meeting nor does it appear on any minute or record of the company whatever; that it was made between the promoters a long time nearly six months after the incorporation of the company; that it was made after all the \$8000.00 had been paid in for the 32,000 shares of stock and could not have been used as an inducement for the stockholders to purchase the \$8000.00 worth of stock from Terwilliger as the date of it, February 15th, 1917, precludes that possibility; that this agreement as to said stockholders receiving all of their investment back out of the first profits of the Company must have applied to the future sales of stock made by Terwilliger subsequent to its date, and lastly that Terwilliger has attempted to deceive these stockholders, and we believe Mr. Atkinson his former Attorney, by setting

up so called valid claims of these stockholders for the return of their money, upon a guarantee that never existed until after the money had been paid. This scheme was acted upon by the actual return to these stockholders as a dividend, of \$800.00 of the \$5000.00 paid in for development purposes under the contract of September 2nd, [251] 1916, which is evidenced by the following checks pro-rated among the stockholders aforesaid who paid the \$8000.00 in the following amounts:

Feby. 28, 1917.	Leslie Smith, 1000 shares.	\$ 25.00
Feby. 24, 1917.	Mrs. Jennie Robinson, 2000 shares	50.00
Feby. 26, 1917.	Geo. J. Shank, 4000 shares	100.00
Feby. 24, 1917.	Albert Lackman, 6000 shares	150.00
Feby. 27, 1917.	T. B. Shank, 4000 shares ..	100.00
Feby. 24, 1917.	J. T. Taecker, 6000 shares	150.00
Feby. 24, 1917.	H. P. Fites, 2000 shares ..	50.00
Feby. 26, 1917.	Geo. R. Droffmeyer, 6000 shares	150.00
Mar. 9, 1917.	C. A. Terwilliger, 1000 shares	25.00
	(evidently being for Mel- (ville W. Curn's 1000) (shrs. Terwilliger sub- (scribed for No. stock- (holder)	

Total\$800.00

You can well imagine the way I felt when I found that this secret arrangement existed; which

after the incorporation for nearly six months, was used to pledge the profits of the company, to the repayment of the capital, paid in for the development of the property to give preferences as described, and how these parties when they got these *pro rata* amounts repaid them, under the belief that the mine was producing such returns, were falsely led by Terwilliger to believe they were to receive the return of their whole money, thus putting these stockholders in meretricious relations to the company, through the profiteering spirit of Terwilliger, whose business it was to raise the money to finance the Company, the business of Dunfee being to do the development work, and to direct the mining operations. Dunfee explained to me, that it being Terwilliger's business to raise the money by a sale of stock to finance the company, while he had misgivings of unfairness on the part of Terwilliger in getting up this scheme, yet as his business was to attend to the mining part, he did not feel like absolutely opposing Terwilliger although his judgment was against the scheme, and he told me about it to advise with me, with the results already stated. Reference is here made to a letter of Terwilliger dated Sept. 30, 1918, marked Exhibit "—," in which Terwilliger talks about the "legality of Mr. Curn's insisting on the return of his investment," as to the situation which Terwilliger caused to exist, directly springing from this scheme, and in which we believe Terwilliger was using the \$25.00 check above mentioned for his own benefit, instead of for Curn, he being the only

subscriber not prorated to under said distribution, and that fact may account for Curn's demand as per Terwilliger's statement for a return of his money, to wit: He did not get what the others got, his *pro rata*.

Whatever Terwilliger said to these stockholders in the way of making promises to them of returning their money, surely, neither such promises, or the agreement of February 15, 1917, can bind the Orleans M. & M. Co., for they were never the act of the company, not authorized by it at any time or in any manner whatever; for, as the Company was organized in September, 1916, and from that time on had a board of directors, any agreement to bind the company must have been made or ratified by the board of directors, and as this one never was, the agreement made by two of its promoters after the incorporation cannot bind it in the least. As shown the majority of its directors who knew of it, to wit: Dunfee and myself, repudiated it. Such a contract was illegal on other grounds, as it was an unfair advantage over other stockholders, and could have [252] been set aside, if the question ever came up before the board of directors to make distribution of the profits of the Company under it. An act done when the company has a board of directors must receive its binding effect through their action alone. Our efforts to get Terwilliger to cancel this agreement of February 15, 1917, resulted in the letter of August 30th, 1917, in which he says: "I hereby cancel the agreement by which I was to receive \$5,000.00 from the

Orleans Mining and Milling Company, and said agreement is to be canceled and returned to the Secretary of said Company upon my return to Brawley; I hereby declare no indebtedness exists against said Company to me." A copy of this letter is marked Exhibit "D." This contract as to Terwilliger and Dunfee was sent in by Terwilliger and canceled by me as well as the copy of it and also that regarding the stockholders as well held by Dunfee. But Terwilliger has held the one which he had applying to the stockholders, and has in his letter of Sept. 30, 1918, set up the pretended legality of Curn for a repayment of his investment. See that letter a copy of which is inclosed. I believe Curn was not distributed to, and that was the cause of his demand. No other stockholder but Curn ever complained. If any promises were made them for a return of their investment, surely Terwilliger made them, and it is to him they should look for such return, if to any one. The separate part of the said agreement referring to the stockholders, Terwilliger never returned although we made an effort to get it returned and canceled as well, but Terwilliger clung to it tenaciously, and we got it from Mr. Atkinson, that he was personating for these stockholders, making demands on the Company for such return, when, as we have shown, he was the man responsible for the false position they were placed in. We have gone into these matters somewhat in detail, in order that you may see, whose acts and conduct was in the line of deception, Dunfee and I, or Terwilliger, and

who did right, we or he in trying to get in this contract, which was unauthorized by the Company and unfair to the stockholders, and every one having, or to have an interest in the Company.

We will now return to the Agreement of Sept. 25, 1917, and the blue-sky proposition already mentioned. As stated the agreement of Sept. 25th, 1917, was intended to direct Terwilliger's efforts to selling stock to persons of means and to avoid the petty business of peddling stock to cooks, barbers, chambermaids and hashers, who need their earnings for present needs and cannot stand a loss. During all the fall of 1917 Terwilliger traveled around through California and Nevada to sell stock under this agreement, but utterly failed to sell any, expending in the effort \$500.00 for traveling expenses. In the early part of January, 1918, Dunfee requested me to write to Terwilliger and secure a report from him as to what he was going to do further, and a copy of my letter marked Exhibit "E" is hereto attached. In reply, I received a letter marked Exhibit "F" and hereto attached dated January 16th, 1918, with contract of September 25th, 1917, enclosed marked by Terwilliger "canceled." From the cancellation of this contract down until the mine was shut down on October, 1918 (Oct. 10), Terwilliger did not sell a share of stock, or raise a dollar in any other way to help run the mine. He came to Hornsilver in the Spring of 1918 and stayed there 2 or 3 weeks doing nothing but look wise, for his talent never run in the practical of directing mining operations.

Dunfee had encountered a fault and had to sink and then drift to get around it, and the ore found in 1918 was low grade and very little profit in it, and was shipped to Brady's Mill at Hornsilver, and we had trouble to get Brady to settle for the ore, his company having gone into a receivership. Terwilliger went with me to Reno on a trip that I made to see Brady, and spent [253] \$100.00 on the trip in expenses. Terwilliger was in Goldfield on the first of August, 1918, and all of us had a talk over the matter of failure to sell stock and the straightened situation in the finances of the Company were in, and we determined to make a report of the Company's policy, and a copy of the same is hereto attached, and marked Exhibit "G," in which the following language will be found: "The owning Company has given its consent in writing directing Mr. E. Carter Edwards, to extend the lease for another year, that is to June 1st, 1920, which will be done." The words: "Which will be done" refer to something to be done in the future during the continuance of the lease, to-wit: The writing of the extension on the back of it, as had already been in the two extensions granted, which was the manner selected of evidencing extensions which the lease shows. No demand was ever made during the life of the lease, or after it expired, or at any time whatever at all, for this extension, parol or in writing or otherwise. But taking this language in its most favorable meaning, that is that an extension was then and there granted of the lease to June 1st, 1920, without fur-

ther act in writing or otherwise, Terwilliger from the 1st day of August, the date of said agreement extending down to the latter part of July, 1921, when the Orleans Hornsilver Mining Co. bought the lease and option of Dunfee and the rights of Le Champ d'Or, or the whole property, never raised a dollar by sale of stock or otherwise, never entered upon the ground, never agreed with Dunfee in any proposition to raise money to develop the property, but left Nevada and stayed away, never wrote to Dunfee or myself on that subject except to Dunfee as hereinafter specified and then failed to propose a proposition, and the extension of the lease to June 1st, 1920, expired, and 14 months after that expired, when Dunfee and myself sold out the whole interest as stated, and only until then do we hear of the Terwilliger demand for one-half of the Dunfee Interest, which was made out of the mine by development done after the extension to June 1st, 1920, had fully expired as shown.

To show Terwilliger's failure to do any act looking to the further development of the mine, or to obtain a further extension of the lease after the expiration of the extension of August 1st, 1918, to June 1st, 1920, or for any other further time whatever, we continue the narrative.

The agreement of September 25th, 1917, canceled and sent in by Terwilliger, and the blue-sky proposition abandoned, and Terwilliger having made no effort after January 16th, 1918, to raise any money, and his letter to Dunfee under date of Sep-

tember 30th, 1918, peremptorily demanding the closing down of the mine, are the facts we proceed from in the continued narration. Dunfee being ordered to do so by a man who backed his demand by a 50% ownership of the stock (the stockholders in Imperial Valley Included) immediately closed down the mine and paid off the remaining debts, which amount to \$404.00. The report and recommendations under date of November 6th, 1918, mention this statement, which no doubt you have if you received the papers held by Mr. Atkinson. Mr. Dunfee says that this statement shows an unpaid balance due by the company of \$202.00, and an equal amount of unpaid debts were presented some time afterwards that made the \$404.00. Dunfee paid off this balance and never troubled Terwilliger with it, out of his own money. The report and recommendations we attach and mark Exhibit "H." We call attention to this report for its frank and fair character and its praising the mine, and shows on its face that no fact is being concealed that could be said in its favor. We also refer to the statement made August 1st, 1918, as to the [254] policy of the company, in which the mine is in nowise disparaged, and that all the other reports and mention of the property found in the Exhibits attached place the mine in an optimistic and deserving light, and as a proposition of merit. But this report did not please Terwilliger, and he wrote Dunfee a letter which we do not have in hand, criticising, and intimating that he stood between the stockholders and impending

danger, who if he failed to restrain, would result bad for Dunfee and the Company. Dunfee's reply to this, a copy of which is attached and marked Exhibit "I," tells Terwilliger how ready and willing he is for the stockholders to know all about anything they desired information on.

In order for a fraud to be perpetrated in a case of this kind, there must be some essential fact withheld, or misstatement, or something done to deceive. The letter ordering the shutting down of the mine shows on its face that Terwilliger thought he had a fair run for his money, and the reports and exhibits show his full knowledge of the situation. It remained for him to act upon this knowledge. Did he? He did nothing from now on until the lease expired on June 1st, 1919, and then did nothing during the running of the year dating from the expiration of the lease by extension June 1st, 1919, for the whole year for which the last extension was granted, to wit: From June 1st, 1919, to June 1st, 1920, when the last extension expired, and all the rights of the Orleans M. & M. Co. ended over the mining property in question. I, as attorney in fact, after that termination, had the undoubted right to grant a lease to anyone else, although if Terwilliger and Dunfee had made a *bona fide* offer to secure another lease would have found me favorable to entertain any reasonable proposition that they might have presented, as I was looking for just that thing, as Dunfee afterwards proposed to Terwilliger just before the ex-

piration of the last extension in May, 1920, as we will soon show.

After the letter of Dunfee dated January 31st, 1919, Exhibit "I," nothing more was heard from Terwilliger until February, 1920, being about 13 months, when either he or Dunfee wrote first, and Dunfee replied by letter written about March 2d, 1920, in which he stated to Terwilliger "That Orleans was best mine in the State of Nevada, which conclusion he had come to after traveling over the state, and that if he, Terwilliger, would come up and they talked the matter over with me, *the* he thought I would grant them a lease." This letter of Dunfee's Terwilliger replied to on May 2d, 1920, and we attach a copy and mark it Exhibit "J," is as follows:

"4419 Finley Ave., Los Angeles, Cal.,
May 2, 1920.

J. W. Dunfee,
Goldfield, Nevada.

Friend Will:

Your letter of some time ago received, and I have been away, hence delayed in replying to same. When will you be in Los Angeles to confer with me regarding the matter of the Orleans property? I would not attempt to do any business through the mail, as I consider it would be time wasted. I expect to be here from now on. Very glad to hear your health is so much improved.

Yours very truly,
C. A. TERWILLIGER."

Dunfee did not go down nor did Terwilliger come up. This letter as its date shows, was written less than a month before the expiration of the last extension, on May 31st, 1920, I have not the letter of Dunfee dated March 2d or about that time, but possibly you have in the papers. After this letter the last extension expired. In June, 1920 and after the expiration of the last extension [255] Dunfee for the first time after the closing down of the mine in October, 1918, under Terwilliger's orders, started to mining on the property under a lease and option that I gave him, and worked on the mine about three months in the summer of 1920. In this lease and option, I had reduced the original royalty of $26\frac{1}{4}\%$ to 20% , as Dunfee very justly complained that the old royalty was too high especially considering the high cost of labor and mining supplies, and the increased depth of the mine. In doing this development during the summer of 1920, Dunfee broke himself, and during all the fall of 1920 the mine was idle and no work done therein. In December, 1920, Dunfee talked the matter over with me, and suggested the bad luck he was in, and proposed that I cancel the lease and option given him on which he failed in the summer of 1920, and that I give him a new one for a long time, and reduce the royalty to 15% , which I did, cancelling other lease and option and granting the new one at 15% , and the doing of this—a long time (4 years) being given, is, I believe, the act of mine that made the discovery of the ore possible which has resulted in the

Orleans proving a mine,—was the granting this new lease and option, for without it Dunfee would have been discouraged, and in all probability not taken any more interest in it, considering the bad luck he had had. After granting this new lease, Dunfee went to work in January, 1921, and discovered the ore in about the middle of March, 1921;—And the development of the same until the 7th of July following, has made this mine, and made the sale of the property a fact. In doing this development work from January to March 15, 1921, Dunfee borrowed from his friends, and extended his credit to the breaking point, and when he did strike the ore in a drift 230 feet from the shaft on the 700-foot level, he would have given over the lease in a few days more, and thrown up the whole matter, he says he was in a couple of days of his limit. Furthermore, he worked alone and climbed down a 600-foot shaft, and threw his muck back into drifts, and gophered around in the workings looking for the ore. He found it, and surely his right to it cannot be questioned. From June 1st, 1920, to March 15, 1921, is ten and a half months, after the extension last given had expired, and the last heard of Terwilliger was May 2d, 1920, until he set up his claim in the latter part of July, 1921, about 14 months. Terwilliger has not put up a dollar nor offered to put up one since the cancellation of the contract in January 1918, to the sale of the property in July, 1921.

He sold \$100.00 worth of treasury stock, the only treasury stock ever sold, and did not turn the

money in, to a man by the name of Winkler at Hornsilver. He never put up a cent of his own money, but it was all from the stock he sold his neighbors to get the \$8,000.00. We also send copy of report showing business for the year 1917, in which it appears that Terwilliger got \$1,200.00 Ex. "K." \$800.00 of this was prorated among the stockholders; \$400.00 given as expense money, and subsequently \$520.00 given him for expense money, and the \$100.00 to Reno, making with his share of \$404.00, \$202.00, \$2,022.00 that he received, which left of the \$5,000.00 received for development purposes less that \$3,000.00. Also Dunfee advanced at times, in order to keep the mine running when Brady was delaying payments for the ore, out of his own moneys, as much as \$2,000.00. These facts when compared with Terwilliger's acts, all bear on the question, was he defrauded. We say no. If there was any fraud, it was his in the manner of dealing with the stockholders already described, and paying dividends out of the money paid in for development purposes. I am sincerely glad that the end found the mine clear of any cloud that might have resulted from getting in a lot of small stockholders, and they found out after the end of the [256] lease, for the first time, that their holdings were based upon a lease and now ownership of the mine. It looks like this property now bids fair to make a mine, and the Company that bought Dunfee and the Le Champ d'Or out are men of merit who have spent their money, and now spending at the rate of \$5,000.00 more per month, and

such a fair prospect is attracting mining men and money to this district, and it looks almost criminal for a peddler like Terwilliger to start any litigation, based upon no meritorious grounds, and hold up and impede a worthy mining enterprise, and block better business which we all so ardently look for. They are now raising the money with sufficient ore in sight to justify it, to erect a mill, with water and electric power, which will cost with sufficient capital to run it in its initial stages \$300,000. Hornsilver has become one of the most promising camps in Nevada, and we should give it a fair chance to grow, and avoid useless litigation in its early life, whatever it may be able to stand in its later stages. The Orleans M. & M. Co., after its operation of the lease and its expiration, I am informed, has been subject to dissolution, because it did not pay its annual stipend to the resident agent and to the State of Arizona, for the years 1918, 1919, 1920 and 1921, and whether the Attorney General of Arizona has actually brought proceedings for such purpose, or the same have been ended, and the Company dissolved, I am unable to say, but know notices were received to the effect that such could be done.

From the foregoing, the following facts appear:

1. That Terwilliger did not put up a cent of his own money.
2. That his manner of selling stock, and using the proceeds of sales for the purpose of paying dividends, was unfair and fraudulent.

3. That he was in the possession of the full facts at all times, and there was no misstatement or concealment made to him.

4. That he had a fair run for his money.

5. That he ordered the mine closed down, and never at any time ordered it re-opened, or raised, or helped raise any funds to re-open.

6. That the only money he raised was the \$8,000.00, and the \$100.00 from the sale of treasury stock, that he failed to turn in.

7. That the extension to June 1st, 1920, fully expired, and though notified a month before such expiration by Dunfee in his letter of March 2d, 1920, he took no steps to secure a further extension, or to raise any further funds with which to develop the mine.

8. That ten and a half months had expired after the expiration of the extension to June 1st, 1920, before Dunfee struck ore.

9. That Dunfee put up his own money and credit, from June, 1920, to July, 1921, in discovering the ore and developing it, without any assistance whatever from Terwilliger.

10. That Dunfee at all times boosted the mine, and always encouraged Terwilliger by his reports and statements as to the future possibilities of it, upon proper development.

We believe the foregoing facts contained in this history, and the accompanying exhibits, will enable you to judge whether or not we have defrauded Terwilliger, or prevented him from exercising his full rights as a stockholder and director

of the Orleans M. & M. Co. We have given you the same consideration in this respect that we gave Mr. Atkinson. We will add the belief, that Terwilliger will treat you like he has all that he has dealt with: Put up no money himself, but leave you and others to bear the burden of any suit that you might bring.

In conclusion, will say that I have given these facts in [257] confidence for your private consideration, in the belief that you will exercise your good judgment in their consideration, and will be free to exercise your unbiased judgment as to whether or not a suit should be brought, and if you should agree with us, we would be pleased for you to favor us with your final determination in the matter.

Yours very truly,
E. CARTER EDWARDS,
Atty. for J. W. Dunfee. [258]

Mr. COOKE.—In reference to Plaintiff's Exhibit 18, being the letter of March 16, 1922, I call your attention to this statement appearing on page 8: "In doing this development during the summer of 1920, Dunfee broke himself, and during all the fall of 1920 the mine was idle and no work done therein. In December, 1920, Dunfee talked the matter over with me, and suggested the bad luck he was in, and proposed that I cancel the lease and option given him on which he failed in the summer of 1920, and that I give him a new one for a long time, and reduce the royalty to 15%, which I did, cancelling

(Testimony of E. Carter Edwards.)

other lease and option and granting the new one at 15%." Is the lease that you referred to there the lease of June 5th, 1920?

(A.) Being cancelled; yes, sir.

(Q.) And were you not mistaken in your testimony a moment ago when you said that lease was surrendered and cancelled in October?

(A.) I didn't say it was cancelled in October, but turned in for cancellation.

(Q.) That is how you intended to put that?

(A.) Yes.

(Q.) It was in fact turned in, but not cancelled?

(A.) Yes.

(Q.) And was in full force until December, is that right? (A.) It was.

The WITNESS.—(Continuing.) All that Mr. Dunfee did in October was to turn in and hand me the lease of June 5, 1920. At the same time he said he was unable to do the monthly shifts, or to perform the conditions of the lease.

(Q.) Did he say anything as to why he wanted you to have possession of the paper instead of himself? (A.) Yes, for cancellation.

(Q.) Then he told you in October that he wanted the [259] lease cancelled? (A.) Yes.

(Q.) What did you say to him?

(A.) I just took the paper and held it.

(Q.) What was it you did in December in the way of cancellation?

(A.) It was this: Mr. Dunfee handed this in for cancellation, I waited to see if he might change his

(Testimony of E. Carter Edwards.)

mind; I wanted the ground protected, and Mr. Dunfee was the only man I had at that and I didn't want to give him up; I wanted to have another chance to protect my property.

(Q.) Then you refused to cancel the lease in October, when he turned it in, in the hope that maybe he would change his mind?

(A.) Well, I didn't refuse it, but I just held it subject to his orders in that respect.

The WITNESS.—(Continuing.) I think there is a written endorsement of cancellation on that June 5th, 1920, lease. It was written on there on the date that it bears. The date is January 1, 1921. The position is that while he turned this lease in, I didn't act upon it in the way of cancelling it until the date of cancellation as shown by the endorsement upon it. Dunfee reiterated in December his proposal that I cancel the lease.

Redirect Examination by Mr. TILDEN.

That long letter introduced by Mr. Cooke was written at Mr. Cooke's request.

TESTIMONY OF R. H. DOWNER, FOR DEFENDANT (RECALLED.)

R. H. DOWNER, recalled by defendant, testified as follows:

The blue-print of the map of the underground workings of the Orleans properties turned over to me by the Tonopah Mining Company has upon its face the assay results. After that blue-print [260]

(Testimony of R. H. Downer.)

was turned over to me I checked up the assays on the ground to a sufficient extent that convinced me that the results are correct. That covered a portion of the mine that extends to the 600 level and thence southeasterly to the vertical line called the Downer line on the map. My checking of assays on that portion of the mine was with the result with respect to the enrichment of the ground, that there are no ore bodies or deposits of any consequence left in the mine above that point, the line designated as the Downer line.

TESTIMONY OF MRS. M. C. KELLY, FOR DEFENDANT.

Mrs. M. C. KELLY, called as a witness for the defendant, duly sworn, testified as follows:

Direct Examination by Mr. TILDEN.

I live in Hornsilver; have lived there since May, 1907. I have been postmaster there since 1911. I have known Mr. Dunfee since 1913.

(Q.) Were you in Hornsilver—I don't suppose it is disputed that Mr. Dunfee was not on the ground from the date that the lease closed down until after the lease expired, May 31, 1920—

Mr. COOKE.—I don't think it is disputed, but I am not clear.

The WITNESS.—(Continuing.) I was in Hornsilver during all of the time between October 10, 1918, and May 31st, 1920. Mr. Dunfee was not operating there during that time. I was there from

(Testimony of Mrs. M. C. Kelly.)

January 1, 1921, on continuously. After that date Mr. Dunfee was operating the Orleans mine. He came out there right after New Year's in January, 1921, and started to work. He worked alone there from January 2, until about the middle of March, entirely alone.

Cross-examination by Mr. COOKE.

The mine is about seven hundred or eight hundred feet from the postoffice. I was there continuously during the period from January 2d, 1921, to March, 1921. I don't think that I was out of town one day or one night. [261]

TESTIMONY OF MRS. M. E. DUNFEE, FOR
DEFENDANT.

Mrs. M. E. DUNFEE, called for defendant, duly sworn, testified as follows:

I was Mr. Dunfee's wife up to about 1912. Am no relation to him now and haven't been since that time. But our relations are friendly and we have communicated with one another quite frequently and he has visited me. I know Mr. Terwilliger; have known him since 1907. I saw him in Los Angeles in 1919, met him on the street about Eighth and Broadway and talked with him. He said that he had Mr. Dunfee tied up in a contract whereby if he sold the mine or the lease he would put him in the pen. I don't know whether I told Mr. Dunfee exactly those words or not; but Mr. Terwilliger also said that if Mr. Dunfee came into California

(Testimony of Mrs. M. E. Dunfee.)

he would attach his automobile and I told Mr. Dunfee that in a letter. I told Mr. Dunfee that Mr. Terwilliger was very angry with him. I saw Mr. Terwilliger in 1920, August, I believe it was, in Los Angeles at about Fourth and Broadway Street. We shook hands and he asked me if I had heard from Mr. Dunfee, and I told him no, and he said that he heard that Mr. Dunfee was about to sell the mine, or the lease. I don't know which, to a Mr. McMahan, and he said if he did that he would land him in the pen. I know that Mr. Terwilliger knew that Mr. Dunfee and I were in frequent communication because he and Mrs. Terwilliger and I used to talk; they have been to my place and we have been to their hotel. They always knew that we corresponded. The date of that first conversation with Mr. Terwilliger was about April or the 1st of May, 1919. The conversation at Fourth and Broadway was a short time before Mr. Dunfee came down in September, 1920.

Cross-examination by Mr. COOKE.

I think Mr. and Mrs. Terwilliger were living at their residence in Hollywood in September, 1920, the same place they had lived since they came up from Brawley. I saw Mr. Dunfee when he came down in September, 1920. He stopped at our house. At that [262] time we lived at 430A South Eastlake Avenue. In 1918 I lived in Bell, California, a little town east of Los Angeles. When I said Mr. Dunfee stopped at "our" house I meant my mother's

(Testimony of C. A. Terwilliger.)

house. That house on South Eastlake Avenue is about ten miles from where the Terwilliger's lived at that time.

TESTIMONY OF C. A. TERWILLIGER, FOR
PLAINTIFF (IN REBUTTAL).

C. A. TERWILLIGER, called in rebuttal, testified as follows:

I did not receive a letter from Mr. Dunfee dated March 2, 1920. I received no letter from Mr. Dunfee written in the month of March, 1920, except the letter of the 26th of that month. I was then living at Los Angeles, 4419 Finley Avenue. I was living there in the month of August and September, 1920, the same place. During that period I called Mrs. Dunfee up by telephone several times and I think I got in communication with her two or three times. I was calling her to ask her about Mr. Dunfee, if she heard from him, if he had been down or if he was down. She said she hadn't heard from him for some time and didn't know when he would be down, and I think she was living at that time, I can't positively say where she was living, but I spoke about coming over, and I asked her if she was going to be home, and she said no, she was busy, and that she would be out; so I called a couple of times, and it didn't seem convenient for her to have me over there, that is, she was busy at that time, all the time, so each time that

(Testimony of C. A Terwilliger.)

I called I didn't get to see her; there was something, I failed to see her.

Cross-examination by Mr. TILDEN.

Her mother answered the phone once, but that is all that I ever had a conversation with her mother. Mrs. Dunfee told me she was nursing.

Mr. TILDEN.—I will ask permission of the Court to add at the end of paragraph 8 of the answer, by interlineation, the [263] words, “denies that the January 1, 1921, lease was a modification, extension or renewal.”

Mr. COOKE.—That is made to meet our amendment?

Mr. TILDEN.—Yes.

The COURT.—It will be permitted.

BE IT FURTHER REMEMBERED: That on the 6th day of December, 1922, the cause was argued by respective counsel, plaintiff's counsel moving the Court for a finding and judgment in plaintiff's favor on the ground that the evidence shows that in equity he is entitled to such relief, and defendant's counsel moving the Court for the dismissal of the cause on the ground that plaintiff by his pleading had elected to pursue and try to recover the lease dated January 1, 1921, Defendant's Exhibit “J,” obtained by Mr. Dunfee, and is not now entitled to pursue or seek to recover the proceeds of the sale of said lease, and further moved the Court, if such dismissal is not granted, for findings and judgment in favor of defendant

Dunfee on the ground that the facts do not show that plaintiff is in equity entitled to any relief. The Court thereupon took the cause under advisement, and thereafter on the 7th day of October, 1925, in the absence of parties and counsel, filed a written opinion and decision denying defendant Dunfee's said motion and deciding said cause in favor of plaintiff and against defendant Dunfee; and thereafter on the 16th day of November, 1925, in the absence of parties and counsel, filed its findings and judgment and decree in pursuance of said decision. That none of the objections or motions made on behalf of defendant Dunfee during the trial, rulings on which were reserved by the Court, were ruled upon by the Court except as herein appears. That said findings are as follows: [264]

(Title of Court and Cause. Appearances.)

FARRINGTON, District Judge.

FINDINGS OF FACT.

This cause came regularly on to be heard on December 1, 1922, upon the Complaint of plaintiffs and the answer of the defendant J. W. Dunfee—the suit as to the defendant Orleans Hornsilver Mining Company, a corporation, having been dismissed by plaintiff; Messrs. Cooke, French and Stoddard appearing as counsel for plaintiffs and A. Tilden, Esq., appearing for the defendant Dunfee. Witnesses were sworn and examined on behalf of the respective parties and oral and documentary

evidence adduced, and thereafter the cause was argued and submitted to the Court, and thereupon the Court makes Findings of Fact as follows:

I.

That the allegations of Paragraphs I, II, III, IV, V, VI, VII, and VIII of plaintiffs' complaint are true.

II.

That the cash consideration agreed to be paid by said Orleans Hornsilver Mining Company to the said defendant Dunfee for the assignment mentioned in Paragraph IX of said complaint, was Forty Thousand Dollars and not Fifty Thousand Dollars as therein alleged; that prior to said assignment the said Orleans Hornsilver Mining Company had no knowledge or notice of the acts charged against the defendant Dunfee by the plaintiffs and that, save as above modified, the allegations of Paragraph IX of plaintiff's complaint are true.

III.

That the shutting down of the mine as alleged in Paragraph II, and elsewhere in the answer of defendant Dunfee, was not intended as an abandonment but only a temporary discontinuance of [265] operations until mining conditions should improve; that the mine was self-sustaining and free from debt, and no other money than that raised by the plaintiff Terwilliger, in addition to the earnings of the mine itself, was necessary to pay expenses; that while Dunfee was acting as president, treasurer and general manager of the Orleans Mining and

Milling Company, he discovered a fine showing of ore in part running from forty-five to fifty dollars per ton, and he also learned where more ore could be probably found, and in so doing he expended above the earnings of the mine about five thousand dollars, which money had been procured from persons *wo* whom the plaintiff Terwilliger had sold stock of the company, and that the defendant Dunfee himself had received three thousand dollars, from the same source; that said Dunfee was occupying a confidential and fiduciary relation to the Orleans Mining and Milling Company and its stockholders; that the said Terwilliger and the other stockholders hoped and expected that a renewal of the lease would be obtained for the Orleans Mining and Milling Company; that they were amply justified in believing and relying on the assurance of the defendant Dunfee that he could and would procure such further extension, and that this hope and expectancy was a valuable property right; that the lease acquired by the defendant Dunfee in his own name about January 1, 1921, and transferred by him to the Orleans Hornsilver Mining Company on July 18, 1921, was acquired during and while he was acting for the Orleans Mining and Milling Company as president, treasurer and general manager.

CONCLUSIONS OF LAW.

I.

That the defendant Dunfee should be decreed to have, receive and to hold the one hundred and

fifty thousand shares of the capital stock of the Orleans Hornsilver Mining Company and the forty thousand dollars in money, in trust for the plaintiffs, [266] and that such be the decree of this Court herein, and within the time to be therein specified the said Dunfee should be adjudged and decreed to fully account for and pay over to plaintiffs the said one hundred and fifty thousand shares of stock, and said sum of forty thousand dollars.

Done in open court this 16th day of November, 1925.

FARRINGTON,
District Judge.

And now, within the time required by the Equity Rules, defendant Dunfee presents and lodges with the Clerk, for examination by plaintiff and the approval of the Court or Judge, this his condensed statement of the evidence and proceedings had at the trial essential to the decision of the questions to be presented for review on his appeal in the above-entitled action, and prays that the same be settled, allowed and approved.

Dated, February 20th, 1926.

AUGUSTUS TILDEN,
Attorney for Defendant Dunfee.

ORDER SETTLING AND APPROVING STATEMENT OF FACTS.

The foregoing statement, including attached map, contains in proper form all of the evidence and proceedings essential to the decision of the questions for review on defendant Dunfee's appeal in

the above-entitled cause, and the same is hereby settled, allowed and approved.

Dated, this 7th day of May, 1926.

E. S. FARRINGTON,
United States District Judge.

[Endorsed]: Filed May 7, 1926. [267]

[Title of Court and Cause.]

STIPULATION RE DEFENDANT'S EXHIBIT "K."

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for plaintiffs and the attorneys for defendant, J. W. Dunfee, that in the preparation and certification of the statement of the record on appeal by the Clerk of said court that the map of the stope assay plan of the Orleans Mine admitted in evidence and marked Defendant's Exhibit "K" may be detached from the original statement of facts and attached to the copy of the statement of facts to be certified to the Circuit Court of Appeals by said Clerk.

Dated this 4th day of June, 1926.

COOKE & STODDARD,
Attorneys for Plaintiffs.
AUGUSTUS TILDEN,
JNO. F. KUNZ,

Attorneys for Defendant J. W. Dunfee.

[Endorsed]: Filed this 5th day of June, 1926,
9 A. M. [268]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of C. A. Terwilliger, etc., Plaintiffs, vs. J. W. Dunfee et al., Defendants, said case being No. B-39 on the docket of said court.

I further certify that the attached transcript, consisting of 272 typewritten pages, numbered from 1 to 272, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such Clerk [269] in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to \$137.45 has been paid to me by the defendant J. W. Dunfee in the above-entitled cause.

And I further certify that the original stipulation waiving citation issued in this cause is hereto attached; and accompanying this record, in accordance with a stipulation filed in this cause, is the original Defendant's Exhibit "K," which is to be returned to the above-entitled office upon the completion of this cause.

WITNESS my hand and the seal of said United States District Court this 17th day of June, A. D. 1926.

[Seal]

E. O. PATTERSON,

Clerk U. S. District Court, District of Nevada.

[270]

[Title of Court and Cause.]

STIPULATION WAIVING CITATION ON
APPEAL.

IT IS HEREBY STIPULATED AND AGREED, that in that certain case in equity as above entitled and wherein the petition for appeal has been allowed to the defendant, J. W. Dunfee, herein to the Circuit Court of Appeals of the United States for the Ninth Circuit, that the citation and admonishment to be and appear in said court at San Francisco, State of California, be, and the same hereby is, waived, and

IT IS FURTHER STIPULATED AND AGREED, that the above-named plaintiffs C. A. Terwilliger et al., may have and they are hereby given, up to and including the 31 day of July, 1925, from date hereof, or such further time as may be

allowed by stipulation or by order of the Court, to show cause, if any there be, why the judgment and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Dated: at Reno, Nevada, this 1st day of June, 1926.

COOKE & STODDARD,
Attorneys for Plaintiff.
AUGUSTUS TILDEN,
JNO. F. KUNZ,

Attorneys for Defendant, J. W. Dunfee. [271]

[Endorsed]: Filed this 2d day of June, 1926, at 9 A. M. [272]

[Endorsed]: No. 4887. United States Circuit Court of Appeals for the Ninth Circuit. J. W. Dunfee, Appellant, vs. C. A. Terwilliger, on Behalf of Himself and All Other Stockholders of the Orleans Mining and Milling Company, a Corporation, Similarly Situated, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Nevada.

Filed June 19, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.